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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES SCHUELER,

Appellant,

v.

MGM GRAND HOTEL, LLC, a Domestic Limited Liability Company d/b/a MGM GRAND,

Respondent.

Supreme Court No.: 71882
Dist. Ct. Case No.: A-15-722391-C

APPELLANT'S OPENING BRIEF

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 OPENING BRIEF

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

DATED this 22nd day of November, 2017.

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ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2), as it is an appeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case.

JURISDICTIONAL STATEMENT

Nevada Rule of Appellate Procedure 3A(b) provides,

> An appeal may be taken from the following judgments and orders of a district court in a civil action: (1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

Appellant Charles Schueler appeals the Eighth Judicial District Court of Clark County, Nevada's August 22, 2016 Order Granting MGM Grand's Motion for Reconsideration. The August 22, 2016 Order was an Order of a district court in a civil action, the judgment entered in the action was final, and the final judgment was entered in an action commenced in the Court in which the judgment was rendered. Therefore, this Honorable Court has jurisdiction over the instant matter.

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TABLE OF AUTHORITIES

Cases cited

Statutes cited

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Issues Presented for Review

1. Did the Court err when it found MGM Grand was Mr. Schueler's statutory employer, thus depriving Mr. Schueler of the ability to sue MGM Grand for his injuries?

2. Did the District Court err when it granted MGM Grand's Motion for Reconsideration, even though MGM Grand's Motion for Reconsideration did not contain any new or additional information that was not available at the time it filed its original motion to dismiss?

Statement of the Case

Appellant Charles Schueler sued MGM Grand Hotel, LLC (the property owner), Ad Art, Inc. (the company that first erected the sign), and 3A Composites USA, Inc. (the maker of Alucobond) for injuries he sustained on July 31, 2013 when he fell 150 feet to the ground while replacing LED signage on the MGM pylon after the floor of the sign gave way underneath him. (001-011). MGM filed a motion to dismiss on the pleadings, arguing it had no duty to warn invitees, such as Mr. Schueler, of open and obvious dangers. (047 – 066). Alternatively, MGM argued it was Mr. Schueler's statutory employer under Nevada's Worker's Compensation statutes and thus immune from suit. Id. Mr. Schueler opposed the motion arguing it is not an open and obvious danger that a floor board will give way beneath somebody. (067 – 077). He further argued MGM was not his statutory employer because falling through the floor is not a risk associated with

the work he was contracted to perform. Id. Initially, the District Court denied MGM's motion on both grounds. (110 – 112). MGM then filed a Motion for Reconsideration of its "statutory employer" argument. (113 – 121). MGM cited no additional case law or evidence in its Motion for Reconsideration. Id. The District Court took the matter under submission without entertaining oral argument, and ultimately ruled MGM was Mr. Schueler's statutory employer and immune from suit. (137 – 140). The district court further found falling from ***inside*** the sign was a risk associated with Mr. Schueler's employment. Id. (emphasis added). Subsequently, the District Court granted MGM's unopposed motion to certify its judgment as final. (157 – 160). Mr. Schuler then filed this interlocutory appeal.

Statement of the Facts

On July 31, 2013, Charles Schueler was an employee of YESCO (Young Electric Sign Company). MGM contracted with YESCO to replace the elevated LED display on its large marquee pylon sign adjacent to the Las Vegas strip. The exterior of the sign was made of a material known as Alucobond. As Mr. Schueler was working, he walked along the floor of the interior of the MGM pylon sign. As he did so, a rusted triangular panel of Alucobond suddenly gave way beneath him. He fell 150 feet to the ground and suffered serious injuries.

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Summary of Argument

MGM cannot be considered Mr. Schueler's statutory employer. When granting MGM's motion, the District Court relied on Richards v. Republic Services, 122 Nev. 1213 (2006). Richards holds that a landowner who hires a licensed contractor enjoys NIIA (Nevada Industrial Insurance Act) immunity when the licensed contractor's employee is injured from a risk associated with their contracted employment. While falling off of the outside of the MGM sign may have been a risk associated with Mr. Schueler's employment with YESCO, falling through the floor on the inside of the pylon sign was not. It simply cannot be argued that falling through a solid floor is a risk of someone's employment. The risks associated with Mr. Schueler's employment were electrocution, tripping, falling from the ladder on the way up the sign, etc. They did not include having a solid floor suddenly break way. Given Mr. Schueler was injured from a condition that was not a normal risk of his employment, the District Court erred when granting MGM's Motion to Dismiss.

Additionally, pursuant to EDCR 2.24, no motions that have already been heard can be renewed or reheard in the same cause of action without leave of court. Pursuant to NRCP 59, the grounds for a new trial (or in this case a new hearing on an issue) are: irregularity in the proceedings, misconduct, accident or surprise, newly discovered evidence or material, manifest disregard of jury instructions,

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excessive damages, or objected to error of law. None of these conditions existed here. As such, it was inappropriate to entertain MGM's Motion for Reconsideration.

Points and Authorities

As noted above, Mr. Schueler asserted a premises liability claim against MGM Grand Hotel, LLC. The primary elements of the claim are liability, causation, and damages. The District Court erred when it found MGM Grand was Mr. Schueler's statutory employer, thus depriving Mr. Schueler of the ability to sue MGM Grand for his injuries and bring these issues to a jury in this matter.

A. The District Court Erred by finding MGM Grand was Mr. Schueler's statutory employer

Respondent, MGM Grand Hotel, LLC, owned the marquee pylon sign in question. At the time of the incident, Mr. Schueler was employed by YESCO, LLC as a sheet metal worker but was "on loan" to the signage department. MGM argued it should be dismissed on the pleadings because it allegedly owed no duty to Mr. Schueler and was allegedly Mr. Schueler's statutory employer under Worker's Compensation statutes. MGM cited Harris v. Rio Hotel & Casino, 117 Nev. 482 (2001) in support of its position. In Harris, The Nevada Supreme Court discussed when a general contractor on a construction site can be deemed the statutory employer of a subcontractor for purposes of Worker's Compensation. It then indicated property owners stand in the shoes of general contractors. This

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case is inapposite to the case at hand, however, because the work Mr. Schueler was performing at the time of his fall was not construction. He was not building anything. His company was not building anything. In fact, no construction was occurring on the MGM Grand sign at all. Mr. Schueler was simply helping to remove one LED screen on MGM's sign so it could be replaced with a different LED screen. While Appellant submits this is clearly *not* a construction case, at a minimum, whether Mr. Schueler was engaged in construction at the time of the incident was a question of fact for the jury to decide.

In non-construction cases, the appropriate test to apply to determine if a property owner can be deemed the statutory employer is the *Meers* test. Harris v. Rio Hotel & Casino, 117 Nev. 482, 491 (2001). Under the *Meers* test, businesses are not protected from liability under the Nevada Industrial Insurance Act for activities that are conducted by independent contractors *outside* the normal work of the contracting businesses. Meers v. Haughton Elevator, 101 Nev. 283, 285 (1985). In the Meers case, a supervisor at a telephone company was injured when the elevator in her office building malfunctioned. The Nevada Supreme Court found that maintenance of an elevator is not part of the normal work of the phone company. As a result, the elevator company could not be considered the statutory employee of the phone company and none of the phone company employees could be deemed the co-workers of the elevator company.

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Similarly, replacing LED cabinets from signs is not part of the normal work activities of MGM Grand. MGM Grand is a global entertainment company. It is not a sign company. MGM Grand contracts its sign work out to independent contractors, such as Mr. Schueler's employer, YESCO. Given the two companies have independent purposes, none of their employees are statutory co-workers of one another. As a result, Mr. Schueler is not covered under MGM Grand's industrial insurance policy. His sole source of recompense from MGM Grand is through his negligence/premises liability claim that has been asserted herein.

Contrary to MGM's assertions in its pleadings before the district court, the issue at hand is not a simple matter of "did the property owner hire a licensed contractor or not?" Harris only applies to *construction* contracts. In fact, as the Nevada Supreme Court explicitly noted, the purpose of the Harris case was to "provide a definitive statement of the rule of workplace immunity under the NIIA in cases arising from the ***performance of construction contracts***. Harris v. Rio Hotel & Casino, 117 Nev. 482, 485 (2001) (emphasis added). Upon examining the facts and the law applicable to that case, the Nevada Supreme Court held "if the defendant in a ***construction case*** is a landowner that has contracted with a licensed principal contractor, the landowner is immune from suit as a matter of law for industrial injuries sustained ***during performance of the construction contract***." Id. at 493 (emphasis added). The Nevada Supreme Court also added:

"The relationship of one independent enterprise with another that contracts to perform specialty work is different from the relationship of a property owner with a general contractor that contracts to construct property improvements." Id. at 494. As such, the Harris case only applies to construction contracts and the Meers case applies to non-construction contracts - such as the one at issue.

More recently, The Nevada Supreme Court has retreated from the "construction versus nonconstruction" analysis and emphasized that NIIA immunity questions must be resolved under the applicable statutory law. Richards v. Republic Silver State Disposal, Inc., 122 Nev. 1213, 148 P.3d 684 (2006). In making NIIA immunity determinations, courts must generally look, initially, at whether the injured employee and other parties were, when the injury occurred, carrying out work under some principal contractor's NRS Chapter 624 license. Richards, 122 Nev. 1213, 1215, 148 P.3d 684, 685 (2006).

In Richards, a refrigeration and air conditioning company employee sued a property owner over injuries sustained when the employee was installing swamp coolers on the owner's property. Id. at 1214. The Nevada Supreme Court held the district court correctly granted summary judgment because the swamp cooler installation was performed by a company that held a Nevada contractor's license and because the employee alleged that his injury resulted from a risk directly associated with working on the installation project. Id. at 1215. The employee in

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Richards was descending from the roof when he slipped off a permanent ladder on the outside of the recycling plant, injuring his right foot and ankle. Id. at 1216-1217.

The Nevada Supreme Court held immunity does not extend to claims based on injuries arising out of the employment in general, but rather, is limited to claims that arise out of a ***risk associated with the licensed work*** for which the contractor was hired. Id. at 1218 (emphasis added). The Nevada Supreme Court reasoned that because the underlying case involves claims based on industrial injuries sustained by an employee working on project for which the property owner hired a licensed principal contractor to complete, ***and because the claims arise out of a risk associated with the licensed work on that project***, the district court properly determined that the property owner has NIIA immunity and granted summary judgment. Id. (emphasis added).

Here, Mr. Schueler was replacing LED lighting in a sign. He was not building a sign. He was not constructing the pylon that held the sign. He was not constructing property improvements. Mr. Schueler was helping to replace an LED display. Replacing an oversized TV is not construction – and is not a risk directly associated with working on the installation project. Id. at 1215. Moreover, falling through the inside of the structure is not a risk associated with the licensed work on that project.

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Given Mr. Schueler was not working on a construction project nor was falling through the floor a risk associated with the work he was contracted to perform, MGM cannot be deemed the statutory employer of Mr. Schueler. The district court erred when it extended protections intended for property owners of construction projects to MGM. In doing so, it robbed Mr. Schueler of his day in court. The whole purpose of the Nevada Supreme Court's holding in Harris was to offer certainty to property owners of construction sites that they would be protected by their workers compensation policies purchased for the construction. Contrary to the district court's ruling, replacing an LED display on a pylon sign it not construction.

As such, Appellant requests this Court to reverse the district court's ruling, to find MGM is not Mr. Schueler's statutory employer, and remand the matter for further proceedings consistent with this ruling.

B. The District Court Erred by Granting MGM Grand Hotel, LLC's Motion for Reconsideration without additional information available at the time of the original motion

Pursuant to EDCR 2.24, no motions that have already been heard can be renewed or reheard in the same cause of action without leave of court. Pursuant to NRCP 59, the grounds for a new trial (or in this case a new hearing on an issue) are: irregularity in the proceedings, misconduct, accident or surprise, newly discovered evidence or material, manifest disregard of jury instructions, excessive

damages, or objected to error of law. None of these conditions existed here. As such, it was inappropriate to permit MGM's Motion for Reconsideration.

In its Motion for Reconsideration, MGM reiterated the exact same statutory employer argument as it set forth in its initial motion to dismiss. (113 – 121). Both MGM and Mr. Schueler cited the Harris decision relied upon by Defendant in its present motion and fully discussed its holding. In Mr. Schueler's brief, he argued the Harris case did not apply but the Meers case did. To the contrary, Defendant asked this Court to apply the holding from the Harris case. Ultimately, the district court applied the test set forth in the Meers case and denied MGM's motion based on that test. To reiterate the exact same arguments MGM set forth in its initial motion was inappropriate. This matter had been fully briefed and entertained by the Court upon hearing oral argument. MGM added nothing new to its initial motion. Its attempt to get a second bite at the same apple should have been denied.

Conclusion

The Harris and Richards cases are inapplicable to the case at hand. As lower Court correctly noted in its initial Order, under the appropriate Meers case, MGM could not be deemed the statutory employer of Mr. Schueler in this matter. Given the Meers test is the appropriate test in the given matter, there was nothing to reconsider. Additionally, the lower Court already considered all of the

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arguments set forth in MGM's Motion for Reconsideration when it entertained MGM's initial motion. Upon a thorough review of the arguments, the lower Court denied MGM's motion. Given there was nothing new in MGM's Motion for Reconsideration, the Court abused its discretion by Granting MGM's Motion for Reconsideration. As such, the district court's decision should be reversed and the matter should be remanded to allow the case to proceed.

Respectfully submitted this 22nd day of November, 2017.

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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 30 pages.

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.

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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 22nd day of November, 2017.

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Certificate of Service

Pursuant to NRAP 25(1)(c), I hereby certify electronic service of APPELLANTS' OPENING BRIEF was made on the 22nd day of November, 2017, by delivering a true copy with APPELLANT'S AND RESPONDENT'S JOINT APPENDIX, was made to the following:

Riley Clayton, Esq. & Ryan Venci, Esq.

An employee of
BRENSKE & ANDREEVSKI