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AD ART, INC.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES SCHUELER, Appellant, vs. AD ART, INC., Respondent.	SUPREME COURT CASE NO.: 75688 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 ANSWERING 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:

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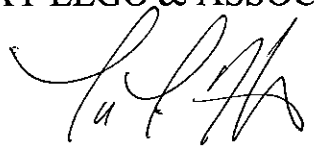
These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

DATED this 6th day of December, 2018.

RAY LEGO & ASSOCIATES



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JURISDICTIONAL STATEMENT

Respondent does not object to Appellant's jurisdictional statement.

ROUTING STATEMENT

Respondent does not object to Appellant's routing statement.

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment in favor of AD ART, when it found that the pylon in this case was not a product for the purpose of a strict liability claim.

2. Whether the District court properly granted AD ART 'S Motion for Reconsideration by rehearing AD ART'S Motion for Summary Judgement.

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STATEMENT OF THE CASE

On July 30, 2015 Plaintiff, Charles Schuler filed suit against MGM Grand Hotel, LLC, AD ART INC., and 3A Composites USA, Inc. as a result of personal injuries he sustained while repairing the MGM pylon. (001-011). On May 20, 2016, prior to the close of discovery, AD ART filed a Motion for Summary Judgment disputing liability as it was not a successor entity of the company who originally supplied the MGM pylon. (047-121). The District Court denied the motion without prejudice so that discovery could continue as to the successor liability issue. (138-139). Defendant AD ART filed another Motion for Summary Judgment on August 2, 2017 arguing: (1) it was not a successor to the entity that performed the services on the MGM pylon; (2) the MGM pylon was not a product for a strict liability claim; (3) Plaintiff's claims were barred by the Statutes of Repose; and (4) Plaintiff's premises failed because Defendant AD ART was not the owner of the MGM pylon nor the occupier of the land that the MGM pylon is located. (140-245). Plaintiff opposed the motion on August 22, 2017. (246-324).

The Court held a hearing on the Motion on September 6, 2017, but deferred ruling on the Motion at that time. (366). On October 9, 2017, the Court issued a Minute Order denying the Motion and finding that Defendant AD ART's ownership was a question of fact for the jury. (367-368). The Court did grant summary

judgment regarding Defendant's fourth point and dismissed the claim for premises liability. *Id.*

Subsequently, Defendant AD ART filed a Motion for Reconsideration regarding the successor liability and product liability claims on December 21, 2017. (375-459). The basis of the Motion for Reconsideration was that the District Court had not fully addressed all the issues and case law that were presented in the original motion for Summary Judgment. *Id.* After reviewing Defendant's Motion for Reconsideration, the Court granted AD ART's Motion for Summary Judgment on the issue of the MGM pylon not being a product for the sake of a product's liability claim. (475-483). Mr. Schuler now files this present appeal.

STATEMENT OF FACTS

The MGM pylon in question was originally designed and/or erected between 1993 and 1994. (047-121). Located at 3799 S Las Vegas Boulevard, this sign is one of the most noteworthy and memorable signs located in the heart of the Las Vegas Strip. The entity involved in the original design and construction of the MGM pylon was a separate entity named Ad Art Electronic Sign Corporation that was liquidated in 2001. *Id.* On or about March 25, 2003, a new corporation, Defendant AD ART, was formed using the former web address, phone number and name of the previously liquidated corporation. *Id.* Subsequently, Defendant AD ART became a Foreign Corporation in the State of Nevada on January 6, 2004. *Id.* Defendant AD ART had

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no involvement in the MGM pylon since its formation in 2003. *Id.* Additionally, Defendant AD ART was not involved in the design, construction or any subsequent maintenance, improvement or retrofit of the MGM pylon in any way. *Id.*

On July 31, 2013, Plaintiff Charles Schuler was contracted through his employer Young Electric Sign Company to repair a LED display on the MGM pylon. (001-011). The MGM pylon is located outside of the MGM Grand Hotel and Casino in Las Vegas, Nevada. Plaintiff fell from the pylon while he was assisting with repairs or alternations of the pylon. Plaintiff sustained serious injuries as a result of his fall. *Id.*

SUMMARY OF THE ARGUMENT

The MGM pylon in this case is not a product that would permit a strict liability claim under Nevada law. The strict products liability doctrine does not apply to items that are uniquely designed and constructed. *Calloway v, City of Reno*, 116 Nev, 250, 263, 993 F.2d 1259, 1267 (2000) (overruled on other grounds). Furthermore, the judicial objectives used to develop the doctrine of strict products liability do not apply to the MGM pylon. *Id.* at 268, 1276.

In reaching its final holding the *Calloway* court used Restatement of Torts (Seconds) Section 402A, to address policy concerns when applying the doctrine of strict products liability. The doctrine of strict products liability developed from judicial objectives to: [1] promote product safety [2] spread the costs of damage from

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dangerously defective products to the consumer by imposing them on the manufacturer or seller, and [3] shift plaintiff's ability to prove a remote manufacturers or seller's negligence. *Id.* Situations that do not further those objectives have traditionally fallen outside of the purview of the strict products liability doctrine. *Id.*

The holding in *Calloway* dictates that the MGM pylon is not a "product" as a matter of law. The pylon was initially designed for the sole use of MGM and built under the direction of MGM. It is unique, it was not mass produced, and it was not intended to be injected into the stream of commerce. The pylon had many different companies involved in its production including those involved in the foundation, supply of materials, and designers. As a result, the policy objectives of the strict products liability doctrine would not be furthered in this case. As such, Plaintiff's strict products liability claim was properly dismissed by AD ART's Motion for Summary Judgment.

Finally, a district court has discretion to grant a motion for reconsideration on "a previously decided issue if substantially different evidence is introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolly, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Since the District Court did not initially take all the necessary factors into consideration when making its first order

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for summary judgment against AD ART, a motion for reconsideration was respectfully submitted and granted at the District Court's discretion.

II. POINTS AND AUTHORITIES

A. STANDARD OF REVIEW

An order granting summary judgment is reviewed *de novo* by this Court. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence demonstrate that no genuine issue remains as to any material fact and that the moving party is entitled to a judgment as a matter of law. When reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the non-moving party. *Id.* at 732, 121 P.3d 1031.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Instead, the requirement is that there be no genuine issue of material fact. *Id.* Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.* Moreover, factual disputes that are irrelevant or unnecessary will not be considered. *Id.*

A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Id.* While the pleadings and other proof must be construed in a light most favorable to the non-moving party, the

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non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him. *Id.* The non-moving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture. *Id.*

Last, this Court has determined that when the party bringing its motion for summary judgment (here, AD ART) does not have the burden of proof at trial, it merely has to negate an essential element of the non-moving party's claim or show that there is no evidence to support it. *Cuzze v. University and Community College System of Nevada,* 123 Nev. 598, 172 P.3d 131 (2007); *See also FRCP 56(c)(1)(A); NRCP 56(c); Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986), *cert. denied,* 484 U.S. 1066 (1988). When the non-moving party bears the burden of proof at trial (here, Appellant), to defeat summary judgment, it must "transcend the pleadings and come forward with documentation admissible in evidence in the form of specific facts that show the existence of a genuine issue/dispute of material facts." *Id.* Otherwise, it is mandatory for the court to enter judgment according to the law. *See* FRCP 56(a); NRCP 56(e); *see also, Beard v. Banks,* 548 U.S. 521, 529 (2006). Appellant failed to meet its burden, thus summary judgment was granted in favor of AD ART and should be affirmed on this appeal.

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B. The District Court properly granted summary judgment in favor of Defendant AD ART, when it found that the pylon in this case was not a product for the purpose of a strict liability claim.

Under Nevada case law, the MGM pylon, is not a product that would permit a strict liability claim. Nevada law, as well as case law from many other jurisdictions, illustrate that the strict products liability doctrine does not apply to items that are uniquely designed and constructed. C*alloway v, City of Reno*, 116 Nev, 250, 993 F.2d 1259 (2000) (overruled on other grounds).

There is a difference between a product for purposes of strict products liability and any other product. For instance, other jurisdictions have gone on to establish that items not put into the stream of commerce, or items that are indivisible parts of a building's structure, are not product's under the product liability doctrine. *See, Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303 (Ill. App.2004)(rejecting the argument that a steel beam from which an employee fell at a construction site could be considered a "product" for strict liability purposes); *See also*, *Dayberry v. City of East Helena*, 80 P.3d 1218 (Mont. 2003)(holding that a city swimming pool was not a "product" for strict liability purposes as a pool was not in the stream of commerce nor was it mass produced or prefabricated). Items that would be considered products from a strict product liability stand point would be relatively common items, such as a hammer or lightbulb, that are easily mass produced, intended to enter into the stream of commerce and can be assembled prior to shipment.

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In this case, the MGM pylon that was designed for the sole use of MGM was not mass produced, it was built under the direction of MGM, and it was not intended to be injected into the stream of commerce. The MGM pylon is a massive structure positioned at a staggering 254 feet tall and 94 feet wide. Since its 1993 or 1994 erection, there have been numerous designers, engineers, contractors and maintenance teams that were all assembled specifically for this one-of-a-kind project.

More to the point, the pylon's original design called for a significantly smaller horizontal LED pylon, whereas in 2013, the pylon was redesigned to include two vertical LED displays. The redesigned displays are 50 feet by 114 feet which creates a 5,700 square foot digital display on each side of the pylon. All things considered, this makes the pylon uniquely designed and constructed. Surely such a massive and complex structure, with such an evolving design could not be deemed to have been prefabricated, especially by this defendant, as Plaintiff states. The fact that the MGM pylon is such a "uniquely designed and constructed" object is precisely why it falls outside of the strict products liability doctrine. Also, for this exact reason it is precluded from the application of strict products liability claims under *Calloway*. Because the District court failed to apply *Calloway* to its full extent, the initial Order for summary judgment was in error.

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The *Calloway* case involved a class action brought by townhouse owners against the builder of the homes. *Id.* at 254-55, 993 P.2d at 1262. The homeowners asserted a strict liability or products liability claim against the builders for the alleged defective-construction of the homes. *Id.* The trial court concluded that the homeowners could not pursue their strict liability claims because "a house is not a 'product' for strict liability purposes." *Id*

In reaching its final holding the *Calloway* court relied on Restatement of Torts (Second) Section 402A. In *Calloway* the court was concerned about enforcing standards that did not support the application of the strict product liability doctrine. For example, the Court explained that the doctrine of strict products liability developed from judicial concerns to [1] promote product safety [2] spread the costs of damage from dangerously defective products to the consumer by imposing them on the manufacturer or seller, and [3] shift plaintiff's ability to prove a remote manufacturers or seller's negligence. *Id.*

These are the same policy considerations taken into account in *Queen City Terminals, Inc. v. Gen. Am. Tramp. Corp.*, 653 N.E.2d 661 (Ohio 1995). Also seeking guidance from Restatement of Torts (Seconds) Section 402A, the Supreme Court in Ohio explained that although the "Restatement...does not specify exactly what constitutes a product meriting the application of strict liability,...[s]trict liability developed to achieve specific policy objectives." *Id.* at 621. "Situations

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which would not further these objectives have long been, recognized to be outside the purview of strict liability." *Id.* The *Queen City Terminals* Court took a careful look at those policy considerations underlying the strict product liability doctrine, and considered whether it should apply in cases involving uniquely designed and constructed products. In that case, the issue was whether specially ordered and designed tanker cars were "products" within the meaning of the strict product, liability doctrine. *Id.* at 620. The Court held that they were not because the policy considerations were not triggered.

Further to the point, the *Calloway* court goes on to actually make distinctions to support its holding that the doctrine of strict product liability should not be applied to uniquely made items. For example, when considering why a townhome is a unique product the court references the fact that products are mass produced goods; 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, product; an architect cannot work out a design weakness in a series of prototypes, which are built but are never put on the market, as is often done with manufactured goods; and a contractor cannot test a variety the methods and materials combinations before putting up the final structure. *Id.* at 269-70, 993 P.2d .at 1271-72 (internal quotations omitted). For these reasons, the Court in *Calloway* determined that a homebuilder cannot be held liable under a theory of

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strict products liability because a home is a unique good that is not mass produced. *Id.*

As applied to this case, the holding in *Calloway* and *Queen City* dictate that the MGM pylon is not a "product" as a matter of law because the policy objectives of the strict products liability doctrine would not be furthered in this case. First, the *Queens City* court stated that the "safety policy is not furthered [because] the process of manufacturing a custom-made item...heavily involves the consumers…in making manufacturing decisions, computing risks, and setting safety specifications," *Id.* Because the MGM pylon is a custom, one-of-a-kind item that was built under the direct supervision of MGM, applying the strict products liability doctrine would do nothing to promote the safety of the MGM pylon. MGM was involved in every aspect of the design of the MGM pylon, and it was not simply the creation of the former AD ART company. (221-245).

Second, the *Queens* court held that the manufacturer was "not in any better position to assume the costs than the Customers [because tire tanker cars were] not a mass-scale enterprise..." *Id.* The purchaser of the tanker cars selected the manufacturer "to produce a specific, one-time order of [tanker cars] to meet the [purchaser's] need. In such case, the manufacturer has no opportunity to spread the costs throughout its many customers, because no other customers exist." *Id.* Here, the MGM pylon was a specific, one-time order of a massive pylon designed

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specifically for the MGM Grand. This is very similar to the purchase of tanker cars which for one specific purpose for the consumer. It was not built for the benefit of any other company, but simply as a way to market the MGM Grand to everyone on the world-famous Las Vegas Strip. Additionally, since the construction of the MGM pylon was not a "mass-scale enterprise," AD ART would not be in a better position to "spread the costs" across its customers by increasing the price of the MGM pylon.

Finally, in *Queens* the court concluded that the manufacturer was not in the best position to determine if the tanker cars were defective, and that other parties involved in the design and manufacturing process were "in a position to know and prove that the manufacturer might have been negligent," *Id.* at 623. According to the court, the doctrine of strict product liability did not apply because "the product was coaxed into the market by its consumers. [The manufacturer] did not launch this product into the stream of commerce, this was a custom-made order, fashioned expressly at the request of [the buyer]." *Id.* at 622. Again, this is not a product that was put into the stream of commerce by AD ART. AD ART created a custom-made pylon, expressly at the request of the MGM Grand. Though other pylons had been made in the past, there is no pylon that is or was identical to the MGM pylon. The MGM pylon was and is truly a one of a kind article.

The *Calloway* court points out "some very real differences between mass-produced goods and [uniquely constructed projects] and their respective methods of

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production." *Calloway*,116 Nev. at 269, 993 P.2d at 1271 (citation omitted). For those reasons, to apply the doctrine of strict product liability in this case would be to ignore "the very real differences" between the unique nature of the design and construction of the MGM pylon in comparison to mass produced goods. It would further frustrate the policy considerations the *Calloway* court explicitly took the time to address regarding when the strict product liability doctrine is applicable.

In addition Plaintiff's Appellate Brief references the fact that the Defendant AD ART lists it's pylon as "products" on its website. However, there is a stark difference between advertising an item as a "product" for consumer navigation of a website, versus a "product" for the purpose of strict products liability. There are specific standards and definitions that the legal realm imposes that simply do not translate in the same way to the general population.

For example, use of the word slander in everyday language can simply mean saying insulting things about someone else. However, in the legal context, there is a standard and burden of proof that must be met before slander is adequately applied to a situation. Similarly, use of the word "product" to point out merchandise to customers who are browsing a non-legal website versus asking a court to grant a specific claim that requires an item to be considered a product as a matter of law for strict products liability, is not the same. Certainly, Plaintiff does not mean to argue that all legal definitions can automatically be correlated to their everyday usage in a

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non-legal context. The MGM pylon is not a "product" under strict products liability, simply because it was listed on a website and therefore the doctrine of strict products liability has no application in this case.

For these reasons, Plaintiff's strict products liability claim was properly dismissed by AD ART's Motion for Summary Judgment and subsequent Motion for Reconsideration.

C. Whether the District court properly granted AD ART 's Motion for Reconsideration by rehearing AD ART'S Motion for Summary Judgement.

Pursuant to NRCP 54(b), "the district court may at any time before the entry of final judgment, revise orders..." *Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003). Moreover, a court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91 Nev. 401, 536 P.2d 1026 (1975). Further, EDCR 2.24 states that a motion that has already been ruled upon cannot be reheard without leave of the court. However, a district court has discretion to grant a motion for reconsideration on "a previously decided issue if substantially different evidence is introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolly, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). (emphasis added).

In seeking reconsideration for its Motion for Summary judgment, Defendant AD ART respectfully submitted that the District Court applied the incorrect legal

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test in determining whether the pylon was a product for a strict products liability claim. AD ART asserted that the District Court's decision was in error because it had not applied the correct analysis in reaching its ruling. This is the primary issue for this appeal. In its original Order denying summary judgment the Court only cited to *Calloway* to define strict products liability. More specifically, the Order states "one is strictly liable for a dangerously defective product if one is a seller 'engaged in the business of selling such a product." (367-368). Thus, based solely on that rationale the Court found AD ART to be a manufacturer of pylons. Further, the Court went on to say that although the MGM pylon is one of a kind, it did not preclude such a claim against its manufacturer, AD ART. *Id.*

As previously discussed, there were a multitude of factors that should have been considered when determining whether the MGM pylon was a product. The Court failed to consider all the criteria that is required for the application of a product being considered for purposes of strict products liability. The District Court did not initially take these factors into consideration when making its first order for summary judgment against AD ART. Therefore, AD ART respectfully asserted that the order was erroneous and then properly sought reconsideration. At that point, the District Court had the authority to either deny the Motion for Reconsideration or to rehear and reconsider its prior ruling.

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In the instant case the Court chose to do the latter. Because the court did not certify its findings of fact, conclusions of law and order for summary judgment entered on October 20, 2017 to be final, the court had the discretion to consider AD ART's renewed motion for summary judgment. Therefore, Plaintiff's claim that the District Court erred by granting the Motion for Reconsideration even though AD ART's motion did not contain any new or additional information, completely fails.

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.

DATED this 6 day of December, 2018.

Respectfully submitted,

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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 6 day of December, 2018.

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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 6th day of December, 2018 electronic service of **RESPONDENT'S ANSWERING BRIEF** was made by delivering a true copy with Appellant's and Respondent's Joint Appendix to the following:

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