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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 AD ART, INC.'S PETITION FOR REVIEW BY THE SUPREME COURT

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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 17th day of August, 2020.

RAY LEGO & ASSOCIATES

/s/ Timothy F. Hunter

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TABLE OF AUTHORITIES

Cases

Calloway v. City of Reno,
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ISSUE PRESENTED FOR REVIEW

The Nevada Supreme Court made a determination on factors and considerations to be addressed when determining whether something is or is not a product for purposes of strict products liability in *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). Would the MGM pylon sign that stands over 150 feet tall and is located on the east side of Las Vegas Boulevard, facing north and south, and featuring displays on both sides, be considered a product for the purposes of strict products liability?

WHY REVIEW IS WARRANTED

A. The facts and history relevant to petition.

On July 31, 2013, Appellant Charles Schuler was contracted through his employer Young Electric Sign Company to repair a LED display on the MGM pylon. (App. Vol. 1 001-011). The MGM pylon is located outside of the MGM Grand Hotel and Casino in Las Vegas, Nevada. Appellant fell from the pylon while he was assisting with repairs or alterations of the pylon. Appellant sustained serious injuries as a result of his fall. *Id*.

Respondent Ad Art filed a Motion for Reconsideration to a Motion for Summary Judgment regarding Appellant's product liability claims on December 21, 2017. (App. Vol. IV 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

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presented in the original motion for Summary Judgment. *Id.* After reviewing Respondent'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. (App. Vol. IV 475-483). Appellant appealed and it was transferred to the Court of Appeals on March 7, 2019, which issued its decision on July 30, 2020.

B. The decision of the Court of Appeals contradicts a prior decision of the Nevada Supreme Court, is of general statewide importance, and is one of first impression.

"Supreme Court review is not a matter of right but of judicial discretion. N.R.A.P. 40B establishes a non-exhaustive list of factors that may be considered in evaluating a petition for review. Those factors include the following:

(1) Whether the question presented is one of first impression of general statewide significance;

(2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or

(3) Whether the case involves fundamental issues of statewide public importance.

Id. For the reasons discussed below, this petition meets each of the requirements to allow for rehearing of this matter.

1. The decision of the Court of Appeals conflicts with a prior decision of the Supreme Court.

When determining what is and is not a product for the purposes of strict products liability, the controlling opinion on the issue is *Calloway v. City of Reno,* 116 Nev. 250, 993 P.2d 1259 (2000). In determining whether the MGM pylon in question was a product for the purposes of strict products liability, the Court of Appeals in applying *Calloway* found that the MGM pylon was a product for the purposes of strict products liability. It was found that the district court "misinterpreted and misapplied *Calloway's* holding." In doing so, the Court of Appeals went against the precedent established by the Nevada Supreme Court in finding that buildings and structures, such as townhomes, were not products for the purposes of strict products liability. Furthermore, the Court of Appeals incorrectly asserted that the MGM pylon was a product based upon the policy objectives that were discussed in *Calloway.*

First, the Court of Appeals cited to *Calloway* and determined that the MGM pylon was a product contrary to the holding of the Nevada Supreme Court. The Court of Appeals agreed with the holding of *Calloway* in that "structures at issue in [that] case [were] not 'products' for the purposes of strict products liability." In

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Calloway, the court noted that townhomes were not products for the purposes of strict products liability. Despite that ruling, the Court of Appeals differentiated between a building such as a townhome and the MGM pylon and found that the MGM pylon was a product for the purposes of strict products liability, in contradiction to the holding in *Calloway*. The Court of Appeals found that the MGM pylon was not a building or a structure.

The Court of Appeals utilized the policy considerations addressed in *Calloway* as well. The Court of Appeals held that from a safety perspective, Respondent Ad Art was in the best position to promote product safety. In support of this position, the Court of Appeals referred to *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963), noting that "imposing this cost on manufacturers creates an incentive to produce safer products…because 'the seller…has undertaken and assumed a special responsibility toward…the consuming public who may be injured by [its products.]'"

This policy consideration is misplaced here, because the MGM sign was not made for the consuming public. It was only made for use by MGM. The Court of Appeals agreed with this position by stating, "the MGM pylon sign is a commercial sign, not a building intended or designed for human occupancy." Even more so it is supported by the record in that the MGM pylon was not being used by Appellant, rather he was an employee of a sign company who was making modifications to the

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MGM pylon. The record also supports that Respondent has had no involvement with the MGM pylon since it was originally constructed in the 1993 to 1994-time frame.

Furthermore, the Court of Appeals noted on several occasions that MGM was not involved in the design of the MGM pylon. Thus, Respondent was in the best place to consider safety. It is important to note that the sign was originally constructed in 1993 or 1994 when the MGM Grand was originally being built at that location. This is supported in the record where Terry Long, who was involved in the original construction, testified that Fred Benninger represented MGM on behalf of the owner. (App. Vol III, 270-271) Benninger was the individual for MGM who was designated to manage the design of the sign and communicate with Ad Art and the owner. *Id.* The MGM pylon was a part of the overall design of the MGM based upon the Emerald City of the Wizard of Oz when it was originally constructed.

2. The decision of the Court of Appeals is one of first impression involving a massive one-of-a kind sign being considered a product.

The Court of Appeals noted that no precedent was presented involving signs and the application of products liability. The decision states, "neither Ad Art nor the district court cited to any relevant or persuasive authority supporting the supposition that commercial pylon signs are significantly analogous to buildings so as to remove them from the sphere of strict liability. In fact, Ad Art failed to cite any authority

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which states that large commercial signs or the like ought to be treated as buildings for the purposes of strict products liability." For that reason, this is a situation of first impression, not only for Nevada, but also across the United States as to whether a large commercial sign would be considered a product for the purposes of strict products liability.

3. The decision involves fundamental issues of statewide public importance.

The history and policy considerations in addressing products involves legal theories dating back centuries. It is important enough that the Court of Appeals did a recitation of the history of products liability law. What is and is not a product for the purposes of strict products liability has been debated in judicial settings throughout the country, with differing results. The application of strict products liability is of fundamental importance in Nevada.

In this situation, the Court of Appeals found the MGM pylon sign was a product for the purposes of strict products liability. That is important more so in Nevada maybe than any place else in the country. The number of significant signs that serve to promote entertainment options in Nevada is unlike anywhere else in the country or the world. Despite the unique nature, the Court of Appeals found that the MGM pylon was not unique in its design or construction. The Court of Appeals also noted, that despite being fixed to the land, it was not a building or a structure. Nor

was it a part of the casino that it is connected with. For those reasons, the decision of the Court of Appeals involves fundamental issues of statewide importance that should be addressed by the Nevada Supreme Court.

CONCLUSION

For the reasons set forth above, Respondent AD ART requests that the Nevada Supreme Court review the decision of the Court of Appeals wherein they found that the MGM pylon was a product. In determining that the MGM pylon was a product, the Court of Appeals improperly applied the ruling of this court in *Calloway*. Furthermore, the MGM pylon does not meet the policy considerations when deciding that something is or is not a product. Finally, the issue of products liability is not only prominent throughout the country, but in Nevada as well.

DATED this 17th day of August, 2020.

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 17th day of August, 2020.

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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 17th day of August, 2020 electronic service of **RESPONDENT AD ART, INC.'S PETITION FOR REVIEW BY THE SUPREME COURT** was made by delivering a true copy to the following:

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