IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR HERNANDEZ, Appellant, vs. THE HOME DEPOT, INC.; AND RIGID TOOL COMPANY and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Respondents.	)	SUPREME COURT CASE NO. 87794

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The following law firms and/or attorneys have appeared and/or are expected to appear in this court:

David Sampson, Esq., of the Law Office of David Sampson, LLC.

DATED this 23rd day of April, 2024

LAW OFFICE OF DAVID SAMPSON, LLC.

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JURISDICTIONAL STATEMENT

This matter is before the Nevada Supreme Court on a certified question from the United States District Court for the District of Nevada. The accepted certified question is as follows:

> Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

ROUTING STATEMENT

This appeal should be retained by the Supreme Court pursuant to NRAP 17(a)(12) ("Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.") The Supreme Court should take this opportunity to clarify whether Nevada shall impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark.

STATEMENT OF ISSUES PRESENTED

This matter is before the Nevada Supreme Court on a certified question from the United States District Court for the District of Nevada. The accepted certified question is as follows:

> Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

STATEMENT OF THE CASE

This matter is before the Nevada Supreme Court on a certified question from the United States District Court for the District of Nevada. The accepted certified question is as follows:

> Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

STATEMENT OF RELEVANT FACTS

This matter arose when a RIGID nail gun malfunctioned and shot OSCAR HERNANDEZ in the chest. *See*, APPDX 075. As detailed in APPDX 083, the gun in question was packaged and sold under the RIGID name.

As seen in APPDX 085, the gun itself prominently bore the RIGID name.

Because the gun in question had packaging and labeling prominently holding itself out as a RIGID product OSCAR sued RIGID under a theory of product liability. APPDX 083. After the close of discovery RIGID filed a motion for partial summary judgment wherein RIGID claimed it was only the licensor of the gun. *See,* APPDX 057. OSCAR filed a response to RIGID's motion. *See*, APPDX 075. RIGID then filed its reply. *See*, APPDX 086. On December 18, 2023, the United States District Court issued an Order Certifying the instant question to the Nevada Supreme Court. *See*, APPDX 109. The Supreme Court accepted the certified question on February 23, 2024. APPDX 115.

SUMMARY OF APPELLANTS' ARGUMENT

As a licensor is well within the stream of commerce, and as section 400 of the Restatement (Second) of Torts, otherwise known as the "apparent manufacturer doctrine" provides that an entity which "puts out" a product as its own will be held liable as though it were the manufacturer of the product, Nevada should impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark.

ARGUMENT

RIGID asks that it not be subject to liability under the theory of strict products liability because RIGID claims it was merely the licensor of the RIGID trade name and was not otherwise involved in the design, manufacture and/or distribution of the nail gun at issue. However, courts have held that licensors, particularly licensors who hold themselves out as the apparent manufacturer of the good(s) in question are liable under strict product liability law.

Section 400 of the Restatement (Second) of Torts provides that an entity which "puts out" a product as its own will be held liable as though it were the

manufacturer of the product. Restatement (Second) of Torts § 400.[1] Named the "apparent manufacturer" doctrine, the rule makes up the basis of many court opinions extending liability to pure licensors such as RIGID that neither manufacture nor sell goods. The rationale for this extension of liability is two-fold. First, having used its trademark to convince the consumer that it was the manufacturer of the goods, the licensor cannot distance itself from the manufacturer when the latter produces a defective good. The second rationale, which was most clearly expressed by the Illinois Supreme Court in *Hebel v. Sherman Equip*., is that "where a defendant puts out a product as its own, the purchaser has no means of ascertaining the identity of the true manufacturer. ... [I]t is thus fair to impose liability on the party whose actions effectively conceal the true manufacturer's identity." *Hebel v. Sherman Equipment*, 442 N.E. 2d 199, 201-03 (Ill. 1982). Indeed in the instant matter, the identity of the true manufacturer was not revealed to Oscar until after discovery closed in the federal action.

Similarly, the Court in *Connelly v. Uniroyal Inc*. held that the doctrine of strict product liability may be applied, by way of the apparent manufacturer doctrine, to licensors who authorize the use of their trademarks, especially when the products do not include any visible indication that the products were

[1] The authority and reasoning set forth herein may be found in Jordan Lewis' article, "TM

manufactured by any other company. *Connelly v. Uniroyal Inc*., 389 N.E.2d 155, 163 (Ill. 1979). In the instant action the gun in question did not indicate it was manufactured by any company other than RIGID. The packaging and labeling on the gun itself prominently displayed the RIGID name. *See*, APPDX 083 and 085. There are no visible indications that the product was made by any other company. *Id*. RIGID cannot disclaim the gun after permitting the prominent use of the RIGID name as was done in this matter.

The principle underlying the *Connelly* decision is often referred to as the "stream of commerce" approach and is routinely cited for the idea that pure licensors can be apparent manufacturers. The theory behind the stream of commerce approach is that all entities that take part in production or marketing are strictly liable for any injuries resulting from the entity(ies) placing a defective good in the stream of commerce. This approach is based in an always-moving cost-benefit analysis, that holds entities who benefit from the sale of defective products responsible for the costs. *Kasel v. Remington Arms Co*., 101 Cal. Rptr. 314, 322 (Cal. Ct. App. 1972).

A multitude of different views have emerged in the case law. The most expansive view holds that the apparent manufacturer doctrine applies to licensors whenever a licensor's name or mark appears on a product. For example, in

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Licensors Beware: Your Product Liability Risks May Vary" Published by Law 360, Portfolio

Brandimarti v. Caterpillar Tractor Co., a plaintiff suffered injury while operating a forklift bearing the Caterpillar tradename, and sued Caterpillar for same. *Brandimarti v. Caterpillar Tractor Co*., 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987). The forklift, however, was manufactured by a subsidiary of Caterpillar; Caterpillar was not involved in the design, manufacture or marketing of the product. Nonetheless, the found that Caterpillar could be held strictly liable because "Caterpillar could expect others to purchase the product in reliance on the skill and reputation associated with the Caterpillar name." *Id* at 139.

Notably, the court did not require the plaintiff to show that he or the owner relied on the Caterpillar name before using or purchasing the product, or that Caterpillar exercised quality control over the product's actual manufacturer. The theme of this holding, and many other courts have followed, is that product manufacturers can expect purchasers or users to rely on the tradename in their decision to buy or operate their products, and therefore can be held strictly liable for a licensee's defective product.

In the aforementioned *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (App. Ct. 1972) the Remington Arms Company was held liable for injuries from the explosion of a shotgun shell manufactures by a licensee in Mexico. The California Court held Remington liable under an enterprise theory and rejected the

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Media Inc., August 29, 2018.

trial court's ruling that would have limited the application of strict liability to actual manufacturers or proof of agency as RIDGE TOOL requests be done in the instant action. In *Remington* the Court ruled in the alternative that as the subsidiary held out the product as being manufactured by the licensor, liability could be imposed upon the licensor. *Id*.

Other states making similar findings include New Jersey, California, New Mexico, Michigan, Pennsylvania, and Washington. *Brandimarti v. Caterpillar Tractor Co*., 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987); *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873 (Mich. 1976) (holding that the broad "continuity of enterprise" theory mandates the imposition of liability on a licensee); Kasel *v. Remington Arms Co.*, 101 Cal. Rptr. 314 (App. Ct. 1972); *Saez v. S&S Corrugated Paper Mach. Co.*, 302 N.J. Super, 545 (App. Div. 1997) (applying the "product line" liability doctrine). There is no reason the Court should permit RIGID to disclaim responsibility for the gun in question given the facts of this matter. Any licensor who holds themselves out as the manufacturer of the product should be held liable under strict product liability law.

Additionally, Nevada has recognized that strict product liability applies to "the suppliers" of goods upon the market. *Ford Motor Co. v. Trejo*, 402 P.3d 649, 653 (Nev. 2017) (citing *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 442, 420 P.2d 855, 857 (1966). A licensor falls under a suppler of goods.

Just as with a manufacturer, a licensor has "invited and solicited the use" of the product. *Id*. Certainly the RIGID nail gun could not be on the market and available to the public if not for RIGID licensing the same. There would be no reason to absolve a RIGID from liability when RIGID, as a licensor, profits significantly from its active role in making the goods available to the public.

Finally, given Nevada law seeks to spread the costs of defective products among those who benefit as a result of the product's presence in the marketplace, surely the licensor, who does literally nothing other than let others use the product name while the licensor sits back and rakes in profits, should be the first in line to bear the cost of any harm that results because the product is on the market. The responsibility of harm resulting from defective products should be spread to all within the stream of commerce. This should include the licensor.

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CONCLUSION

For the foregoing reasons this Court should hold that Nevada does impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark.

DATED THIS 23rd day of April, 2024

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

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 Word 2007 in Times New Roman, font size 14.

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 is proportionately spaced, has a typeface of 14 points or more, and contains **2,592** words.

3. 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.

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 23rd day of April, 2024.

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CERTIFICATE OF SERVICE

I certify that the above APPELLANT'S OPENING BRIEF was served on all parties to this action via the Court's CM/ECF electronic filing program the 23rd day of April, 2024.

/s/ Amanda Nalder
An employee of THE LAW OFFICE OF DAVID SAMPSON, LLC.