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Schueler v. Ad Art, Inc., 136 Nev. Adv. Op. 52 (Jul. 30, 2020)

Ashley Schobert

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Recommended Citation

Schobert, Ashley, "Schueler v. Ad Art, Inc., 136 Nev. Adv. Op. 52 (Jul. 30, 2020)" (2020). *Nevada Supreme Court Summaries*. 1325.

<https://scholars.law.unlv.edu/nvscs/1325>

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STRICT PRODUCTS LIABILITY: A CASE-BY-CASE DETERMINATION OF WHAT CONSTITUTES A “PRODUCT”

Summary

In Nevada, no explicit definition has been adopted to define what constitutes a product for purposes of strict products liability. Rather, the considerations set forth by section 402A of the Second Restatement of Torts must be examined on a case-by-case basis to determine whether the policy objectives underlying the doctrine of strict products liability are served by classifying the subject object as a product. Accordingly, certain classes of objects—such as large commercial signs or custom-made objects—are not automatically precluded from the application of strict products liability where the party is engaged in the business of designing, manufacturing, and selling such objects.

Background

In 1993, MGM commissioned Ad Art, a commercial sign manufacturer, to design, manufacture, and install a large sign. Ad Art made the sign at its manufacturing facility in Stockton, California and then transported it to Las Vegas where it was installed by Ad Art and local construction subcontractors. Ad Art and the third-party contractors installed a 150-foot tall steel pylon embedded in a concrete foundation and Ad Art then mounted and installed its sign on top of the steel pylon. As a whole, Ad Art employees designed, engineered, and managed both the production and installation of the sign.

In 2013, MGM hired Schueler to service the pylon sign’s LED display. While Schueler walked along the sign’s interior platform, a panel affixed to the floor as part of the sign’s original design allegedly failed, causing Schueler to fall 150 feet to the ground below. Schueler suffered serious bodily injury as a result.

Schueler filed a complaint against Ad Art, alleging, among other claims, a cause of action sounding in strict products liability. Ad Art then filed a motion for summary judgment, arguing that (1) it was not a successor corporation; (2) the MGM sign was not a product for purposes of strict liability; and (3) the statute of repose was applicable. The district court initially denied Ad Art’s motion and Ad Art moved for reconsideration, only setting forth the first two initial arguments. Upon reconsideration, the district court reversed course and granted Ad Art’s motion for summary judgment, concluding that the sign was not a product that is subject to the doctrine of strict liability. The district court did not reach the issue of successor liability.

Discussion

The Court began with an analysis of the history of strict products liability, noting that courts initially followed the privity rule, which held that a negligent manufacturer is generally not liable for injuries caused by its products *unless* the victim is the person who actually purchased the product.² However, courts in the United States departed from this approach by abolishing the

¹ By Ashley Schobert.

² *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch. Pl.) (1842).

privity requirement in the early 20th Century.³ But because tort claims initially required plaintiffs to prove that a particular party in the product supply chain had failed to exercise due care,⁴ plaintiffs began bringing defective products claims under contract theories instead.⁵ Defective products claims were then brought back into the realm of tort law when the California Supreme Court held that a manufacturer can be held strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being.⁶

The Court then recognized that building upon this history, Dean William Prosser incorporated this concept in the Restatement (Second) of Torts section 402A, providing that if a product is defective and causes harm to a person or property, liability will be imposed on the manufacturer regardless of the manufacturer's lack of fault and whether they were in privity with the plaintiff.

The Court stated that it has long recognized that the doctrine of strict products liability in tort is governed by the Restatement (Second) of Torts section 402A. The Court also set forth three policy objectives that it examines in conjunction with the considerations set forth by section 402A. These policy rationales include (1) promoting safety by eliminating the negligence requirement; (2) spreading the costs of damage from defective products to the consumer by imposing them on the manufacturer; and (3) removing concerns about a plaintiff's ability to prove a remote manufacturer's negligence.⁷

The Court next focused its discussion on determining whether an item or good is a product for the purpose of strict products liability. It noted that the Second Restatement does not provide a standard definition of what constitutes a product, and thus it appears that the drafters assumed that courts would develop the doctrine via common law by applying the policy objectives to the facts of the case presented. After considering supplemental briefing, the Court came to the conclusion that adopting a fixed definition of product is not necessary because applying the policy objectives articulated in section 402A is sufficient to resolve the question presented, and utilizing a case-by-case methodology is a more prudent approach. The Court also noted that this approach is versatile and would thus allow the doctrine to adapt to technological advances.

The Court next examined the merits of the case at hand. It noted that the district court's finding in favor of Ad Art turned on its interpretation of *Calloway*. The district court concluded that the *Calloway* court held that townhomes—and in turn, “buildings”—were not products for purposes of strict liability and extended that holding to apply to the MGM sign because it was a “building” and a one-of-a-kind object that was not mass produced.

The Court concluded that the district court misinterpreted and misapplied *Calloway*'s holding. The Court explained that the townhome was precluded from strict products liability in *Calloway* not because of the nature or classification of the product, but rather due to other circumstances. Overall, the Court found that *Calloway*'s holding can be explained in three parts: (1) parties alleging only economic loss cannot invoke the doctrine of strict product liability;⁸ (2) strict products liability claims are viable only against those who are engaged in the business of selling or manufacturing the defective product in question;⁹ and (3) the structures at issue in that

³ See *Macpherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

⁴ Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 568–69 (2014).

⁵ *The Law of Torts* § 450 (2d ed. 2017).

⁶ *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1986).

⁷ *Calloway v. City of Reno*, 116 Nev. 250, 268, 993 P.2d 1259, 1271 (2000).

⁸ *Id.* at 268, 993 P.2d at 1270.

⁹ *Id.*

particular case were not products for purposes of strict liability.¹⁰ Thus, the Court found that there was no language in *Calloway* that categorically removed buildings or other similar objects, especially large commercial fixtures such as the MGM sign.

Applying the *Calloway* analysis to the instant case, the Court found that the MGM sign is a product for purposes of strict products liability and that the district court's finding failed as a matter of law. To begin, the district court's finding was predicated on the premise that, under *Calloway*, buildings are exempt from strict liability. The Court noted, however, that not only is this not a proper holding from *Calloway*, but even if it was, the holding did not permit an inference that the MGM sign should be considered a building. Next, the Court explained that because Schueler was not claiming only economic loss, but rather serious bodily injury, his claim is proper under strict products liability. Finally, the Court found that Ad Art was not simply a subcontractor or installer of component parts, but rather Ad Art built, sold, and designed the MGM sign and thus was liable under strict products liability.

The Court then found that the district court also committed legal error when it concluded that the MGM sign was not subject to strict products liability because it was a one-of-a-kind object and not mass produced. The Court explained that a product does not need to be mass-produced and that unique products are not automatically excluded from strict liability. Rather, the appropriate determination is whether the defendant was engaged in the business of designing, producing, and selling the objects. The Court went on to caution that accepting the proposition that uniquely designed objects are automatically exempt from strict products liability would largely insulate manufacturers, and this outcome is inconsistent with policy objectives.

Lastly, the Court addressed Ad Art's arguments that subjecting it to strict products liability would run counter to policy objectives. The Court analyzed the three objectives set forth in *Calloway*: (1) promoting safety by eliminating the negligence requirement; (2) spreading the costs of damage from defective products to the consumer by imposing them on the manufacturer; and (3) removing concerns about a plaintiff's ability to prove a remote manufacturer's negligence.¹¹

Ad Art first asserted that the application of strict liability would not promote safety in this instance because MGM was involved in every aspect of the design and the sign was not simply created by Ad Art. The Court concluded, however, that the facts were not consistent with this assertion because nothing in the record indicated that MGM was involved in the sign's design. Rather, the Court found, holding Ad Art strictly liable would promote safety because Ad Art was in fact in the business of manufacturing and designing commercial signs, and thus assumed a duty toward the ultimate user who, in this case, suffered severe bodily injury from their defective product.

Ad Art then argued that because of the sign's unique nature, it had no opportunity to spread costs. Ad Art cited to a case in which the defendant was not held liable under strict liability because it was commissioned to manufacture train cars as part of a one-time commission in which it had never built anything comparable.¹² The Court noted that *Queen City*, however, is distinguishable from the instant case because the record indicates that Ad Art was in the business of making, selling, and designing commercial signs that were similar to the one in question. Accordingly, Ad Art had an adequate opportunity to design and develop safe products, and in turn, to spread costs.

Finally, Ad Art asserted that because the sign was custom-built, it was in no better position than MGM to know of the manufacturer's negligence. The Court rejected this argument. It noted

¹⁰ *Id.* at 254, 993 P.2d at 1261.

¹¹ *Id.* at 268, 993 P.2d at 1271.

¹² *Queen City Terminals, Inc. v. General American Transport Corp.*, 653 N.E.2d 661, 672 (Ohio 1995).

that there is nothing in the record indicating that MGM or its employees were heavily involved in either the manufacturing or design of the sign. Rather, the record demonstrated that Ad Art was significantly involved in every step of the process. Thus, the Court was wholly unpersuaded by Ad Art's arguments regarding policy objectives and instead found that holding it liable under strict products liability did in fact further the policy objectives of the doctrine.

The Court's discussion concluded with analyzing Ad Art's argument that the sign is more akin to an immovable real estate fixture and thus exempt from strict products liability. The Court also found this argument unpersuasive because (1) immovable fixtures are not automatically exempt from the doctrine of strict liability; (2) there is no evidence demonstrating that the sign is suddenly immovable; and (3) whether the sign is movable is not dispositive of the ultimate legal question. Overall, the Court noted that the Second Restatement of Torts does not limit the application of strict liability to personal chattels and this distinction cannot be inferred from the Restatement.

Conclusion

The Court held that the considerations set forth in section 402A of the Second Restatement of Torts must be contemplated on a case-by-case basis in order to determine whether an object is considered a product for purposes of strict products liability. Accordingly, a specific and limiting definition of product was not adopted.

Additionally, the Court found that when objects are designed, manufactured, and sold by a party engaged in the business of selling and manufacturing such objects, applying strict products liability is appropriate.

Finally, custom designing an object for a customer does not automatically remove an object from the sphere of strict liability, especially where the public policy considerations for applying strict products liability are satisfied.

Because Ad Art was in the business of designing, manufacturing, and selling commercial signs and the policy considerations set forth by section 402A were satisfied in this case, the Court found it was appropriate to classify the MGM sign as a product for purposes of strict products liability. Accordingly, the Court reversed the district court's grant of summary judgment in favor of Ad Art and remanded the case for proceedings consistent with the Court's holding.