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NO. 66101-9-1

WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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TAYNA OSHATZ,  
Appellant,

vs.

GINSING, LLC, dba THE WILD GINGER and  
THE TRIPLE DOOR,

Respondent(s).

APPEAL FROM THE  
SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE DOUGLASS A. NORTH

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APPELLANT'S AMENDED REPLY BRIEF

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUL - 1 AM 11:27

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## I. INTRODUCTION

The Respondents argue that Appellant's brief "should be disregarded and sanctions imposed against appellant's counsel for flagrantly violating the Commissioner's ruling [of June 9, 2011]." (See p.6.) This is another unfounded attack on Appellant's counsel, which unfortunately has come to characterize the Respondent's briefing. The Appellant filed her amended brief pursuant to the Commissioner's letter-order of June 9. The Appellant's brief complies with the Commissioner's letter order and there is no violation.

The Respondent did *not* file a motion to strike any portion of the brief, which would have required a specific statement and supporting authority about how and why the Appellant's supplemental brief violated the Commissioner's order. Instead, the Respondent simply makes sweeping but unsupported claims of misconduct without specificity. If there is any kind of briefing which ought to be specific, it is an allegation of misconduct in opposing counsel.

A *default* judgment was entered against Crossen by the trial court on April 18, 2011, by the trial court. The significance of the *default* judgment to this appeal, cannot be overstated. Crossen

made no effort to defend his conduct. He conceded that the allegations were true. His deposition testimony provided the evidentiary support for the default judgment. The *default* judgment means that the allegations against Crossen made in the plaintiffs' complaint, are true---at least insofar as Crossen is concerned. This strengthens *every claim* made against Ginsing as well. The Appellant provided additional relevant authority to support those claims in its amended brief filed on June 20, 2011. Appellant provided additional citations to authority

**II. THE TRIAL COURT NEVER RULED THAT *TEGMAN*<sup>1</sup> APPLIED OR THAT LIABILITY MUST BE APPORTIONED BETWEEN THE PARTIES. THAT ISSUE IS THEREFORE NOT BEFORE THE COURT IN THIS APPEAL.**

Ginsing sought another, alternative ruling by the trial court in its motion for summary judgment, again based on its claim that Crossen acted with intent to harm Ms. Oshatz. Since the trial court dismissed Ginsing, it never reached a ruling on this issue and it is therefore not before the court on this appeal. However, should the Court wish to address this issue in this appeal, it has sufficient evidence to do so.

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<sup>1</sup> *Tegman v. Accident and Medical Investigations, Inc., et al.*, 150 Wn.2d 102; 75 P.3d 497 (2003).

Mr. Crossen was convicted on charges of assault in the third degree,<sup>2</sup> which is dispositive on the issue of whether he acted with intent to cause harm. Intentional harm is not an element of third-degree assault and there is *no evidence* that Mr. Crossen intended to harm Tanya Oshatz. Further, the perpetrator,<sup>3</sup> the victim,<sup>4</sup> and a witness<sup>5</sup> of the crime have all testified by Crossen, that there was no intent to harm Oshatz. The *only* party asserting intent for purposes of *Tegman*, is Ginsing, who is financially interested such a finding.

Even if the Court of Appeals considered dismissal on another basis, the plaintiff should have an opportunity to defend against any new basis for dismissal asserted by the defense in subsequent briefing or oral argument.

### **III. GINSING ADMITS MATERIAL FACTS UPON WHICH ITS LIABILITY IS PREDICATED**

Ginsing admits that Tanya Oshatz dined at the Wild Ginger just before she was injured. This is conclusive regarding her status

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<sup>2</sup> RCW 9A.36.031(1)(f)

<sup>3</sup> See declaration of Tanya Oshatz at CP 130.

<sup>4</sup> See Respondents' Brief at page 1.

<sup>5</sup> See declaration of Penelope Oshatz at CP 135, 191, and 195.

as a business invitee, including her ingress and egress to the business establishment. Ginsing also admits that it owned the Wild Ginger where Tanya Oshatz dined before she was injured, *and* the adjoining Triple Door where the incident occurred.<sup>6</sup> There is no evidence that Ginsing did not exercise exclusive control over both businesses.

Ginsing also admits that Crossen was indeed ejected for being “*visibly* intoxicated and belligerent *inside* the Triple Door night club.”<sup>7</sup> Ginsing also admits that Tanya Oshatz was injured by Crossen “*without warning or provocation*”<sup>8</sup> and “*without any time to prevent it.*”<sup>9</sup> Finally, Ginsing admits that Tanya Oshatz “suffered an injured shoulder in the fall.”<sup>10</sup>

#### **IV. IF THE COURT REACHES THE MERITS, MATERIAL FACTUAL DISPUTES PRECLUDE SUMMARY DISPOSITION**

In its brief, the Respondent relies almost exclusively on the testimony of the declarations of its own employees, prepared by counsel in opposition to the motion for summary judgment. In

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<sup>6</sup> Respondent’s Brief at page 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Respondent’s Brief at page 2, bottom of page.

<sup>10</sup> Respondent’s Brief at page 3, first paragraph.

doing so, the Respondent ignores Appellant's Opening Brief and virtually all of the testimony and evidence provided by the Appellant, thus avoiding all of the factual disputes that exist in this case.

*Respondent claims that "...Crossen was not observed to be under the influence of intoxicants upon entering the Triple Door..."*<sup>11</sup>

Crossen consumed at least sixteen alcoholic drinks and smoked marijuana in the three hour period before he arrived at the Triple Door.<sup>12</sup> Crossen himself admits he was so drunk that he does not recall arriving at the Triple Door.<sup>13</sup> Taken together, this testimony creates a reasonable (indeed *unavoidable*) inference that Mr. Crossen was *very likely very* intoxicated when he arrived at the Triple Door, and that this was *very likely visible*.

Ginsing argues that it is possible for alcoholics to be extremely intoxicated but act just fine.<sup>14</sup> Given all of the circumstantial evidence on Crossen's intoxication, however, this becomes *a key factual dispute*. Whether or not Ginsing's

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<sup>11</sup> Respondent's Brief at pages 1-2.

<sup>12</sup> Appellant's Opening Brief at pages 6-9 and citations to the record therein.

<sup>13</sup> See CP 83 at page 8 line 17

<sup>14</sup> See Respondent's Brief at pps. 16-17.

employees should have noticed that Crossen was intoxicated simply cannot be decided by the trial court on summary judgment. Even if it could, the testimony of Tanya Oshatz raises another point. She testified that she “nearly fell backwards from the smell of alcohol on Mr. Crossen.”<sup>15</sup> Tanya’s mother, Penelope Oshatz, also testified that Crossen was “extremely drunk,” “the odor of booze was all over him,” and he was “extremely unsteady on his feet.” CP 191 at par. 6. This description is reinforced by his clumsy effort to pick up Ms. Oshatz.

Crossen “*only became belligerent because he was refused an alcoholic beverage.*”<sup>16</sup>

The *reason* for or *timing* of Crossen’s belligerence is immaterial: The only material issue relevant to the plaintiff’s claims, is whether Crossen knew that Ginsing *knew* that Crossen was drunk, belligerent and/or assaultive, *before* he was ejected from the club without notice to Ms. Oshatz of his potential danger to her.

Crossen “*was not served alcohol while inside the Triple Door.*”<sup>17</sup>

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<sup>15</sup> CP 130 at par. 12.

<sup>16</sup> Respondent’s Brief at page 2.

<sup>17</sup> Respondent’s Brief at page 2.

Again, this assertion ignores the record of this appeal, and Crossen's own deposition testimony. Crossen testified that he had a "big mixed drink" and "a smaller drink" at the Triple Door.<sup>18</sup> Crossen admitted a history of alcoholism and repeatedly testified about his lack of recall because of his extreme intoxication. It is reasonable to infer from this, that Crossen had a drink in his hand most of the time that he was at the Triple Door.

Ginsing also claims that it has no duty "*to prevent a third party from harming another.*"<sup>19</sup>

This was not a tort between two "third parties." This was one customer known to the defendant to be assaultive, physically placed in immediate proximity of another customer and business invitee. Either under theories of premises liability law or basic negligence law, the plaintiff asserted viable claims against Ginsing in the trial court.

#### **V. GINSING REFUSES TO CONCEDE THAT IT OWES ANY DUTY TO ANYONE**

In Ginsing's briefing in the trial court and this Court, it refuses to concede *any* liability to *any* customer or business invitee

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<sup>18</sup> Appellant's opening brief at page 9, section D, and citations to the record therein.

<sup>19</sup> Respondent's Brief at page 3, par. 2.

on *any* grounds. Ginsing emphasizes Tanya Oshatz's physical location on a public sidewalk as the main fact upon which it relies. Ginsing argues that, because Oshatz was eight feet away from their front door, that they are completely and totally immune from their negligence in over-serving Crossen; or physically putting Crossen, who they knew to be drunk and assaultive, in close proximity to another customer; and failing to warn Tanya Oshatz that Crossen was drunk, belligerent or assaultive. Ginsing has also ignored the numerous material fact disputes created by the testimony on Ms. Oshatz, her mother, and her expert witness.

However, the location of the plaintiff is not determinative. In *Groves v. Tacoma*, 55 Wn.App.330, 777 P.2d 566 (1989), Division II of the Court of Appeals held that an abutting landowner, who uses a public sidewalk for his or her own special purposes, can indeed be liable to one injured on the sidewalk.

Tanya Oshatz testified in her declaration that Ginsing controlled and monitored pedestrian traffic right in front of the Triple Door where she was injured.<sup>20</sup> The Respondent also ignored the testimony of Appellant's expert, Gordon Naccarato, a very experienced chef and restaurant owner. Mr. Naccarato testified

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<sup>20</sup> See CP 127-133, especially paragraphs 16-20.

that a restaurant owner's duty to exercise reasonable care indeed extends to the sidewalk immediately in front of the restaurant.

Appellant provided some authority to the trial court involving business invitees which were injured on defendants' property. CP 154 to 156. Appellant also touched general theories of negligence to support her claims against Crossen. CP 155-156. However, since the focus of Ginsing's motion was the claimed intentional tort of Crossen, neither theory was briefed sufficiently for the court to dismiss Ginsing.

Our Supreme Court has also addressed situations in which a defendant can be required to "take charge" of a person to prevent injury to another. In *Aba Sheikh v. Choe*, the court held:

As a general rule, our common law imposes no duty to prevent a third person from causing physical injury to another. See Restatement (Second) of Torts, § 315 . . . However, this court recognizes an exception to . . . these general rules in *Restatement (Second) of Torts*, sections 315 and 319. See, e.g., *Taggart v. State*, 118 Wn.2d 195, 218-21, 822 P.2d 243 (1992). Under section 315(a), a duty arises where "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." Through *Taggart* and its progeny, we have adopted one class of these "special relation" cases as described in section 319: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent

him from doing such harm." 118 Wn.2d at 219 (quoting Restatement (Second) of Torts § 319).

156 Wn.2d at 448.

**VI. RCW 4.22.070 HAS NO APPLICATION WHERE BOTH TORTFEASORS WERE NEGLIGENT AND THE PLAINTIFF WAS FREE OF FAULT.**

This key statute, which was part of the Tort Reform Act of 1986,<sup>21</sup> apportions liability between the parties to an action for damages caused by tort. There is no reference to "intentional torts" or "negligent torts" in the statute. However, the statute provides a mechanism for the apportionment of fault (and therefore damages) under certain circumstances. Joint and several liability is preserved in circumstances where the plaintiff is faultless, as here. RCW 4.22.070(1)(b) provides:

If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at *fault*, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

*(Emphasis added).*

RCW 4.22.015, in turn, defines *fault* as "acts or omissions . . . that are in any measure *negligent* or *reckless* toward the person or property of the actor or others . . . ." *(Emphasis added.)*

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<sup>21</sup> RCW 4.22, et seq.

Under the literal terms of sections .015 and .070, joint and several liability is preserved in Oshatz's claims against both Ginsing and Crossen. Crossen was convicted of third degree assault under RCW 9A.36.031. Subsection (1)(f) of that statute provides that the crime requires only criminal "negligence" which causes bodily harm. There is no distinction anywhere in the Tort Reform Act for a distinction between criminal or civil negligence. Fault is joint and several in all cases where the actors are either *negligent* or *reckless*. If the legislature or the court in *Tegman* wished to make a distinction between criminal and civil negligence for purposes of apportioning fault, they would have said so.

**VII. TEGMAN HAS NO APPLICATION BECAUSE CROSSEN DID NOT INTEND TO HARM OSHATZ**

The *Tegman*<sup>22</sup> case further interpreted the Tort Reform Act of 1986, especially in the context of intentional and negligent defendant tortfeasors. Although the case immediately created controversy,<sup>23</sup> and has spawned at least nine progeny, the *Tegman*

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<sup>22</sup> *Tegman v. Accident and Medical Investigations, Inc., et al.*, 150 Wn.2d 102; 75 P.3d 497 (2003).

<sup>23</sup> NOTE: *Tegman v. Accident & medical Investigations, Inc., The Re-Modification of Modified Joint and Several Liability by Judicial Fiat*, 29 Seattle Univ. L.R. 729 (206). Also see concurring opinion in *Aba Sheikh v. Choe*, 156 Wn. 2d 441 (206) (by Chambers, J.).

rule remains vague where *intentional acts accidentally* cause injury.<sup>24</sup>

The injury that Tanya Oshatz sustained is analogous to most torts, where a specific action is *intended* by the defendant but which *accidentally* harms a plaintiff. A driver operating a vehicle at high speed intends to drive fast, even illegally, but does not intend to lose control on a curve, or harm his passengers. An intoxicated commercial pilot may intend to operate an airplane while drunk, even illegally, but does not intend to lose control of the airplane on takeoff and harm his passengers. A doctor whose license has been suspended and nonetheless performs a surgery illegally, does not intend to injure his patient. A jealous husband who intends to crash his car into his wife's car, does not intend to injure others – but does. A party misuses a product by intentionally using the product, even illegally, but creating an unintended result of injury or damage.<sup>25</sup> These are examples of real cases where a specific and illegal action was intended, that resulted in unintentional injury.

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<sup>24</sup> “The issue we decide is whether negligent defendants are jointly and severally liable for damages resulting from both negligent *and intentional acts*.”

<sup>25</sup> RCW 4.22.015 specifically refers to “misuse of a product” as an example of negligent or reckless conduct.

These cases do not come within the *Tegman* rule, and neither should this case.

### VIII. CONCLUSION

The factual elements which control liability in this case under any theory are saturated with disputes. This much is evident from the time and space devoted to the factual disputes in the briefing by the parties. Appellant respectfully submits that the trial court's dismissal of Ginsing was error in numerous respects and acts this Court to reverse and remand.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2011.

  
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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted and mailed by regular, U.S. Mail, a true and accurate copy of Appellant's reply brief to counsel for Respondents.

DATED this 30<sup>th</sup> day of June, 2011, at Edmonds, Washington.



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