

**FILED**

APR 03 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Case No. 318125

IN THE COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

Whitman County Superior Court Cause No. 11-2-00221-5

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MEGAN L. MITCHELL,

Plaintiff/Respondent.

v.

OMEGA OF THETA XI ASSOCIATION, a Washington nonprofit corporation; THETA XI FRATERNITY, a Missouri nonprofit corporation; CHI DEUTERON CHAPTER, INC., PHI SIGMA KAPPA, a Washington nonprofit corporation; THE GRAND CHAPTER OF PHI SIGMA KAPPA, INC., a Delaware nonprofit corporation; JOHN DOES 1-10; and ABC COMPANIES 1-5,

Defendants/Appellants.

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APPELLANTS OMEGA OF THETA XI ASSOCIATION'S  
AND THETA XI FRATERNITY'S  
REPLY BRIEF

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ORIGINAL

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**A. The Appellant properly and timely identified at fault parties and had no duty to identify the local chapter as an “at fault” entity because it was not “at fault” for plaintiff’s claims.**

As it did at trial, Respondent has confused the obligation of identifying an “at fault” entity with simply asserting that the party sued is not a proper party at all. RP 950:25-953:10. Appellant explained at trial, and again here, Respondent’s argument is legally unsound. RP 953:11-954:15; RP 958:23-959:6. Further, Respondent incorrectly asserts that Appellant now claims the local chapter was responsible for Ms. Mitchell’s injuries. At no time has Appellant made such an argument.

The record establishes that Respondent sued Theta Xi Association, a group of alumni who serve as a support organization to the local chapter of the fraternity. RP 687:13-23; RP 690:8-691:4.

The local chapter is itself a separate legal entity. RP 688:4-6. Here the local chapter was called Omega Chapter of Theta Xi Fraternity. That entity was not sued. RP 688:11-15.

The claim in this case was one based on a premises liability theory and involved who was in control of the fraternity house premises such that it should have put up signage or modified the fire escape so as to prevent the type of accident that occurred with Ms. Mitchell.

Theta Xi Association denied in its answer that it was liable to plaintiff and specifically asserted, pursuant to CR 8(c) and CR 12(i) that

the entity who had the control necessary to make permanent changes to the house was Chi Deuteron, who also happened to be both the owner of the property and the landlord of the property. From the perspective of the Association, the local chapter who actually leased the premises from Chi Deuteron, did not have any liability so the Association had no duty to identify the local chapter as a potentially at fault party under CR 12(i) or CR 8(c). Respondent's assertion to the contrary is legally unupportable.

Lastly, the lease speaks for itself and clearly identified that the owner of the property, Chi Deuteron, leased the building to the local chapter, not to the Association. The fact that the plaintiff sued the Association did not obligate the Association to tell the plaintiff what the lease clearly said: if they intended to sue the leasing entity they failed to do so. However, at no time has the Association asserted that the leasing entity, whoever it may be, had the authority or control to make changes at the fraternity house. Therefore, Respondent's argument that the Association had a duty to name the local chapter as an "at fault entity" is legally and factually erroneous.

**B. The Association did not have control or possession of the fraternity house and should have been granted judgment as a matter of law.**

The factual record presented to the jury by the close of the Respondent's case was that the local chapter, not the defendant

Association, leased the rooms in the house to its members RP 702:15-16; that Chi Deuteron owned the house RP 704:18-19; and that the Association provided support to the local chapter members. RP 687:13-15.

In its briefing Respondent argues that providing a house mother to watch over the fraternity members themselves or helping the members properly collect and pay their rent turned the Association into a “possessor” of land. Appellant disagrees but more importantly, the focus for a judgment as a matter of law is what evidence has the claiming party presented. Here, the Respondent presented NO EVIDENCE that the Association had the authority or ability to control the fire escape; control the installation of permanent signs or control modifications to the building.

Absent evidence of an “intent to control” the property, which Respondent failed to present, the Association’s motion at the close of Respondent’s case should have been granted.

**C. The trial court wrongfully denied the admission of the actual lease entered into by a non-party and Chi Deuteron to the absolute prejudice of the Association.**

The trial court denied the admission of the lease and affirmed that decision throughout the trial. The factual record on this issue is worthy of review.

On motions in limine and again in trial, the Court admonished counsel that the lease was not going to be admissible. This was the Court's ruling on June 12, 2013. RP 6/12/13, p. 639:19-20. This ruling was made despite the fact that the lease between Chi Deuteron and Theta Xi Chapter was properly identified in ER 904 submissions by both sides without any objections as to authenticity or admissibility. CP 403:5-6; 415:3-5; 681:14-16 and 692. However at trial in motions in limine Respondent moved the court to exclude the lease arguing it would be improperly used to identify Chi Deuteron as an empty chair after they had been dismissed on motion for summary judgment. RP 6/10/13, p. 31:6-39:3.

In motions and on Day 1 of the trial, Theta Xi Association argued to the Court that although Chi Deuteron was dismissed on the only theory they were sued upon (as a landlord), Chi Deuteron also had liability as the installer and person in control of the fire escape and the lease should be admissible to establish these facts. After this argument, the court ruled the lease would not be admissible at trial. RP 6/10/13 p. 31:6-39:13.

The issue as respects the admissibility of the lease was again argued on Day 2 of the trial and the ruling of the court remained unchanged. (RP 6/11/13, p. 372 – There was a break in the recording, RP 372:15 but argument continued thereafter at RP 372-385.)

On Day 3 of the trial the issue of the lease again was raised when Respondent's counsel argued for the admission of subsequent remedial measures. RP 6/12/13, p. 564:22-RP 588. At that time, discussion was had on whether the lease had been offered and denied through the ER 904s. RP 6/12/13, p. 580-581. The trial court initially stated the lease would be admissible, RP 6/12/13, p. 581, stating his reasoning to be that if the plaintiff opened the door on subsequent remedial measures he would "tend to let the lease in." RP 6/12/13, p. 587.

In so doing, the Court specifically said "I'm going to leave it up to the plaintiff to decide whether you want to offer evidence of subsequent remedial measures . . . If you get to that area, I'm going to let the defendants – it raises a factual issue." RP 6/12/13, p. 587:11-588:4.

The Respondent quickly determined to not pursue subsequent remedial measures so the Court's prior ruling denying admissibility of the lease remained intact. RP 6/12/13, p. 588:10-12.

The admissibility of the lease was again addressed in the afternoon session of Day 3 of the trial and the Court again affirmed "I'm keeping the lease out until I am convinced it's admissible." RP 6/12/13, p. 639:19-21.

Later that afternoon Mr. Zaremba, a member of the named defendant Theta Xi Association, was asked a question implying that the Association was the landlord to which Appellant's counsel objected. RP

6/12/13, p. 700:20-25.

When asked by the court counsel explained “describing the Association as the landlord.” The Court overruled the objection. RP 6/12/13, p. 701:1-4.

Mr. Zaremba went on to testify regarding a different document, Exhibit 18, which was the Individual Housing Agreement each chapter member living in the house had to sign in order to rent his respective room. As respects that agreement Mr. Zaremba testified that the landlord for the entire house, who then leased rooms to the individual members was not the Appellant but instead was the local chapter, an entity that was not sued. RP 6/13/13, p. 701:21-702:16. The plaintiff rested her case on Day 4. RP 6/13/13, p. 939:19. At that time the Court’s ruling, that the lease was not admissible, was still in force.

In Appellant’s motion for judgment as a matter of law, the existing ruling of the Court (to not allow the lease itself into evidence) was addressed yet again. RP 6/13/13, p. 941:9-17; RP 956:3-5; RP 957:21.

The Court provided its ruling on the motion and discussed the history of the lease as evidence stating the lease was in evidence pretrial during the summary judgment motions and surprisingly initially stated he had reserved a ruling on the lease at trial, RP 961:20-962:8 but in further explaining his ruling, the Court also affirmed the lease was offered by the

defendant at trial but that the lease was not allowed into evidence. RP 6/13/13, p. 961:24; 962:2-8, 15.

The remaining witnesses for the defense, including Mr. Montgomery, a 30(b)(6) witness for Chi Deuteron, could not add anything more to the arguments that had already been made and rejected by the Court regarding the admissibility of the lease and the court's ruling denying the admission of the lease remained intact after four separate days of Appellant seeking revision of that ruling.

The Appellant did all it could to change the Court's mind and allow the admission of the lease to no avail. The denial of that crucial piece of evidence was an abuse of discretion.

Respondent argues the Appellant should have tried yet again, for a fifth day, to change the Court's mind. There is no such legal requirement to repeatedly try every day to the end of trial to challenge a court's ruling. Here, the Court ruled, and repeatedly re-affirmed, the lease was not admissible into evidence. That ruling, given the facts at hand, was an abuse of discretion.

**D. The Association was denied the ability to submit annual inspection reports commissioned by Chi Deuteron which would have shown who actually had control over the conditions existing on the property.**

The Appellant called a 30(b)(6) representative of Chi Deuteron as

a witness through deposition testimony: Mr. Montgomery. Part of that testimony addressed yearly inspections done by an entity called HRH, an entity whose reports plaintiff's expert Mr. Gill testified he reviewed. RP 6/12/13, p. 645:9-649:8 (Gill) and RP 584:9-16 (Montgomery testimony).

The trial court incorrectly struck those portions of Mr. Montgomery's deposition dealing with the HRH reports despite their relevance to establishing who did, and who did not, have and exercise control over the premises. RP 6/14/13, p. 1173:3-1175:13. Not permitting the admission of those reports was prejudicial to the Appellant and an abuse of discretion by the trial court.

**E. The trial court abused its discretion by allowing hearsay evidence of an alleged invitation to the house.**

Respondent's arguments that the hearsay testimony of an alleged invitation to the fraternity house is three pronged: first, Respondent argues the text was made by a member of the defendant Association: this assertion lacks factual support; second, that it was not offered for its truth and instead falls into the classification of an "operative fact", a little used concept offered first by the trial court but which is directly contradicted by the evidence; and third, that it was harmless error, a totally false assertion.

First, it was Respondent's burden of proof, not Appellant's obligation to refute (See Respondent's Brief, p. 34) that the alleged

speaker of the statement, Mr. Gilbertson, was a member of the Respondent Association. No such evidence was presented at trial. No evidence that Mr. Gilbertson had the ability to bind or act for the Association was presented. In fact no evidence regarding the standing of Mr. Gilbertson was presented at trial.

The burden for Respondent at trial was to establish that she was an invitee and not a trespasser. In motions in limine the Appellant sought the exclusion of Chezny Goble's testimony that she was invited to the fraternity party through a text message by someone she believed to be a member of the fraternity who she thought had the authority to invite her. CP 1357-1358. Respondent opposed this motion, CP 1410;11-1416:4, arguing the application of ER 801(c) citing Tegland, Courtroom Handbook on Evidence, §801:3.

However, Respondent's argument fails on its face. To qualify as a social guest rather than a trespasser required evidence of (1) an express permission or invitation; or (2) prior conduct of the owner such as to lead one to believe that he had implied permission or an implied invitation to enter upon the owner's premises. *Dotson v. Haddock*, 46 Wash.2d 52, 278 P.2d 338 (1955).

The only evidence presented by Respondent to establish this fact and satisfy her burden of proof was the testimony of Chezny Goble who

testified that a person she thought was a fraternity chapter member, Josh Gilbertson, who did not live in the Theta Xi house, invited Ms. Goble to the fraternity house. Ms. Goble further claims that she was invited a second time [at approximately 1:30 a.m.] also allegedly by Mr. Gilbertson by text, to the fraternity after she and Respondent had left the House earlier in the evening. Although Ms. Goble claims that the alleged initial invitation, and alleged second after-hours invitation, were transmitted via text message, no text messages were produced by Respondent in discovery nor offered as trial exhibits.

Without question it was Respondent's burden of proof to present evidence that she was actually invited, not that she thought she was invited, to the fraternity house that night in order to establish that she held the position of "invitee" rather than the position of a "trespasser." Absent actual evidence of an invitation, Respondent's claims failed as a matter of law and fact. This was even admitted by Respondent's counsel at the time of trial. RP 6-10-13 p. 54.

It is therefore undisputable, as both a matter of law and fact, that the testimony of Ms. Goble regarding the text messages was offered for its truth and therefore constituted hearsay. ER 801(c). That hearsay was properly objected to and should not have been admitted into evidence.

Second, the trial court's apparent application of the "operative

fact” rule, now adopted by Respondent (incorrectly cited by Respondent as CP 66:15-68:1 but actually located at RP 6/10/13, p. 66:15-71:17) was in error. In the present matter the Respondent was allowed to present verbal testimony through a friend, not a party, that the friend allegedly received a text which gave Respondent the belief that she was invited to the fraternity house. RP 6/11/13, p. 295:5-21; p. 302:11-p. 303:21. Without question, Respondent’s state of mind is not the issue. The issue is was Ms. Mitchell in fact an invitee or a trespasser. Therefore, this testimony was offered for the truth of the matter asserted, not simply because it was stated.

Third, the admission of these alleged texts was not harmless error. Absent evidence of an actual invitation even respondent's counsel admitted respondent's case was futile. Therefore, it is undeniable that the admission of this hearsay was NOT harmless error but instead was an abuse of discretion by the trial court.<sup>1</sup>

**F. Respondent’s request for fees should be denied.**

Appellant has raised not only proper, but compelling, legal issues for consideration by this court. Respondent’s misunderstanding of the difference between suing an improper party and asserting fault does not

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<sup>1</sup> The testimony that it was common knowledge women were always welcome at fraternity parties did not constitute an invitation to Ms. Mitchell nor did the fact that her friend had previously been invited have any bearing on the issue.

render this appeal baseless.

Likewise, Respondent's incorrect interpretation of the trial court's clear refusal to allow into evidence both the lease and the HRH reports does not render Appellant's arguments baseless.

Lastly, the trial court's admission of hearsay to establish a required factual contention in order to meet Respondent's burden of proof was in error and constitutes an abuse of discretion.

Appellant has provided abundant citations to the record to support all of the issues herein presented and respectfully requests Respondent's request for fees be denied.

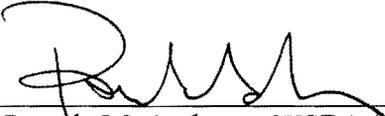
### **CONCLUSION**

The jury was improperly permitted to deliberate a case against an entity that legally bore no responsibility for the Respondent's claims. Further, the trial court abused its discretion in denying the admission of the lease for the property; precluding the HRH reports and permitting inadmissible hearsay on a determinative fact in this case.

For these reasons the Appellant asks that either Respondent's claims be outright dismissed, as they should have been at the close of her case in chief for lack of evidence, or the matter be remanded for a new trial.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of April, 2014.

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