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

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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Brief of Respondent Megan L. Mitchell

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## I. INTRODUCTION

Defendant-appellant Omega of Theta Xi Association (the "Association") now attempts to raise that a third-party, Omega Chapter of Theta Xi Fraternity (the "Local Chapter") is liable for Plaintiff-respondent Megan Mitchell's ("Ms. Mitchell") serious and permanent injuries after she opened a door marked "EXIT" at the Theta Xi Fraternity house ("Fraternity house") and stepped onto an unmarked and unlit ladder style fire escape with a 2x3 foot hole in the landing. The Civil Rules and the Rules on Appeal prohibit the Association from raising this new non-party argument on appeal.

The Association's argument that the trial court should have granted it a directed verdict based on a lack of "substantial evidence" of possession and control of the Fraternity house lacks legal authority, including good faith argument for the extension of existing law. Regardless, sufficient evidence existed in the record before the trial court to deny the Association's request for a directed verdict and to submit to the jury the question of possession and control.

The Association's second and third assignments of error lack factual basis in the trial court record, as the trial court did not even rule, much less abuse its discretion in ruling on the issues raised. The Association fails to cite the trial court's rulings from which it bases its second and third assignments of error. The Association's final assignment of error, an evidentiary ruling, lacks support by existing law or its good faith extension, and even if the testimony was inadmissible, its presentation to the jury was harmless.

Ms. Mitchell requests attorney fees and costs pursuant to RAP 18 and RAP 14.

## **II. ASSIGNMENTS OF ERROR**

1. Did the trial court correctly conclude that there was sufficient evidence that the Association was a possessor of the houses after the Association admitted, in part, that it had unrestricted access to all common areas, subleased the individual rooms to students, hired a live-in house director, managed the house finances,

and exercised control through written and oral rules, regulations, and directives?

2. Did the trial court properly exercise its discretion when it reserved ruling on the admissibility of the lease and the Association did not move thereafter for its admission, and if not, was such ruling a proper exercise of the trial court's discretion?

3. Did the trial court exclude inspection reports from evidence, and if so, did the court properly exercise its discretion?

4. Did the trial court properly exercise its discretion when it allowed a witness to testify that she and Mitchell had been invited to the fraternity house, and if not, was the error harmless?

### **III. STATEMENT OF THE CASE**

#### **a. Facts**

On September 27, 2008, Ms. Mitchell, a sophomore at Washington State University, and her friend Chezny Goble ("Ms. Goble"), a member of Delta Gamma Sorority, RP 293:19-294:7, attended a Washington State football game, RP 294:19-18. After the

game, the two young women went to a dance at the Fraternity house. RP 295:22-25. Josh Gilbertson ("Mr. Gilbertson"), a member of the Local Chapter, had invited them to the house. RP 295:5-17; 770:25-771:12.

Ms. Mitchell and Ms. Goble stayed at the Fraternity house for approximately an hour, socializing and dancing. RP 299:20-300:8; 774: 11-22. Ms. Mitchell had never been to a fraternity prior to that evening, and other than taking a sip of a mixed drink, Ms. Mitchell did not consume any alcohol that day. RP 229:12-19; 773:11-774:1.

After leaving the Fraternity house, Ms. Mitchell and Ms. Goble ran into an acquaintance, Kris Herda ("Mr. Herda"), a 2007 Washington State graduate and a high school math teacher. RP 301:7-16; 302:3-10; 387:9-388:1; 775:22-25. While the three of them were talking, Mr. Gilbertson texted Ms. Goble and again invited her back to the Fraternity house. RP 302:11-22. Ms. Goble explained that she was with Ms. Mitchell and Mr. Herda, and Mr. Gilbertson informed that all three were welcome to come to the

Fraternity house. RP 303:1-18; 309:13-310:1-2. Daniel Forsmann ("Mr. Forsmann"), the 2008 Local Chapter president, testified that Local Chapter members could invite non-members to the house, without limit as to the number of guests a member could invite. RP 1211:3-18; 1243:2-5; 1252:25-1253:2.

Both times that Ms. Mitchell and Ms. Goble entered the Fraternity house they entered through a back door where other guests also entered the house. RP 296:12-17; 303:22-25; 390:14-17; 776:22-777:1. Mr. Forsmann confirmed that the back door automatically closed and that the door was opened from the inside by someone inside the house, as there was no outside handle. RP 1253:3-19.

After returning to the Fraternity house, Ms. Mitchell, Ms. Goble and Mr. Herda went up to the dance floor. RP 304:7-10; 390:18-23. Mr. Herda also had never previously been to the house. RP 390:8-10. Ms. Goble then received another text from Mr.

Gilbertson, who was in the house, and she went to look for him. RP 304:15-305:5; 391:14-15.

When Ms. Goble did not return, Ms. Mitchell and Mr. Herda tried to call and then looked for Ms. Goble since they wanted to leave. RP 391:13-392:2; 777:17-778:1. At no time were Ms. Mitchell, Ms. Goble or Mr. Herda ever asked to leave the Fraternity, or instructed that any area of the house was off limits. RP 307:3-9; 399:21-400:6; 772:13-773:7; 778:2-8. Representatives of the Association later confirmed that house policy allowed visitors in all common areas, which included all hallways, bathrooms, and exit areas. RP 692:18-21; 693:3-18 (Carl Zaremba, Association treasurer); RP 728:2-5; 729:8-24 (Curt Anderson, Association president); RP 1251:22-1252:1-4 (Mr. Forsmann, student president).

The lighting throughout the Fraternity house that evening was dimmed. RP 391:3-9; 394:17-21; 779:7-10. While in a hallway on the second floor, both Ms. Mitchell and Mr. Herda saw a standard green illuminated "EXIT" sign at the end of the hall above a door.

RP 393:1-10; 600:25-601:4; 778:11-25. All the bedroom doors in the hallway were closed and not opened by Ms. Mitchell or Mr. Herda.  
RP 824:18-25.

The president of the Association, Curt Anderson, and other witnesses all confirmed that there was nothing on or around this "EXIT" door that would warn a visitor, like Ms. Mitchell or Mr. Herda, that on the other side of the exit door was a fire escape with a 2x3 foot hole in the landing. RP 393:13-394:1; 605:15-24; 610:22-611:1; 669:11-13; 720:17-21; 779:1-3, 11-19. The door was painted the same color as all other doors in the house. RP 605:20-21; 719:22-25. There was no warning alarm or signage that indicated it was an emergency exit. RP 605:21-24; 720:1-12.

After stepping out the door, Ms. Mitchell fell through the large, unlit hole in the landing to the concrete 20 feet below. RP 395:1-8; 779:25-780:8. There was no exterior light on or above the fire escape to illuminate the hole. RP 396:16-21; 611:18-24.

Immediately after Ms. Mitchell fell, Mr. Herda stood at the doorway and was unable to see the hole. RP 396:1-397:9.

Ms. Mitchell suffered multiple injuries, including a liver laceration, rib fracture, pubic rami fracture, and a pneumothorax . RP 418:9-15. Her worst injury was a comminuted and displaced right elbow fracture requiring two separate surgeries, resulting in substantial loss of range of motion and permanent disability. RP 419:4-25; 420:13-421:12; 423:3-9; 424:14-425:11; 456:3-9.

The lack of any warning on the interior of the door made the fire escape an unreasonable hazard. RP 603:10-18; 606:18-607:14; 625:2-9; 629:15-630:7; 673:11-18; 674:3-10; 678:7-679:3. The hazard was known by the Association long before Ms. Mitchell's fall. Curt Anderson, the Association president, inspected the house in 2006, examined the Exit door, noted the lack of alarm or emergency exit sign, and observed the large hole in the landing on the other side of the door. RP RP 719:10-18; 720:1-721:12. Mr. Anderson was also

aware that in 2005 another person had fallen from the same fire escape. RP 723:15-24.

As Association president, Mr. Anderson issued an executive order that members of the Local Chapter could not use the fire escape for any non-emergency reason, which order he expected the members to follow. RP 724:6-10, 20-22; 726:15-18. Mr. Forsmann confirmed that Mr. Anderson's executive order was known by the Local Chapter members and was expected to be followed. RP 1216:14-24; 1250:9-1251:1. The executive order was not written down, and known only by Local Chapter members. RP 725:16-21. RP 727:10-13; 1250:24-1251:11.

At the time of Ms. Mitchell's injury, the house was owned by a fraternity housing corporation known as Chi Deuteron Inc., who leased the house to the Association. RP 707:3-8. Mike Montgomery, the president of Chi Deuteron Inc., had contacted Carl Zaremba, the Association's treasurer ("Mr. Zaremba"), to see if it was in the market to lease the house. RP 1191:21-1192:1; 1193:16-19; 1194:1-

9. The Association, which is organized "to provide housing" for the Local Chapter members signed the lease agreement. RP 689:21-24; 718:6-8; 1248:1-5. The Local Chapter members rented individual bedrooms, not the entire house. RP 1248:6-8. The Association purchased the house in 2011. RP 1480:25-1481:1; CP 1077-1085; RP 744:14-21.

Further, while the Individual Housing Agreement identified the Local Chapter as lessor, and the individual members as lessee, CP 719, Mr. Zaremba admitted that the Association actually rented the house to the Local Chapter members, RP 691:5-8. The Individual Housing Agreement was prepared by the Association, the Association obtained the individual member's signatures, and the Association collected the signed agreements. RP 694:3-5; 699:22-24; 701:15-17; 702:15-19. Mr. Zaremba explained that the Individual Housing Agreement was "... modeled after the lease agreement that was prepared by the landlord that *we* were leasing from". RP 702:21-24 (emphasis added).

Mr. Zaremba again admitted to the jury that the Association was the actual tenant of the owner (Chi Deuteron Inc.), not the Local Chapter, when on the issue of repairs, he testified that the Association "would look to Chi Deuteron to pay those. While *we were a tenant*, we would look to them to pay". RP 707:3-8 (emphasis added). Mr. Zaremba also testified that if Chi Deuteron Inc. had a question regarding repairs, it would contact the Association, not the Local Chapter. RP 714:23-715:1-8.

The procedure for repairs evidenced the Association's possession and control of the house. If something needed to be repaired at the house, the Local Chapter members would contact the Association and would look to the Association to pay for the repairs. RP 690:24-691:4; 1226:21-25. The Association had an open account at a Pullman building and hardware store for the Local Chapter's use, which account the Association paid. RP 690:15-24; 708:18-23. When the Association contacted someone to make repairs, the Association paid for it. RP 708:1-8.

If there was damage in the common areas of the Fraternity house, the repairs (and payment) was between Chi Deuteron, Inc. and the Association. RP 704:14-19. Mike Montgomery, the president of Chi Deuteron, Inc., confirmed that if repairs were needed, Chi Deuteron, Inc. would discuss it with the Association. RP 1196:2-8. Mr. Montgomery also testified that major structural issues were Chi Deuteron, Inc.'s responsibility, but "from the door inside that would be Theta Xi's responsibility." RP 1196:18-20; 1202:9-12. The Association's president, Mr. Anderson, testified that "infrastructure" repairs were the responsibility of the Association. RP 742:18-23.

The Association also exercised control over the premises by issuing written and oral rules and directives for the Fraternity house. For example, the Individual Housing Agreement required the Local Chapter members to abide by the Association's rules, regulations and bylaws. RP 697:12-18. In fact, many of the Local Chapter rules were created by the Association. RP 1216:21-24.

As further evidence of the Association's possession and control of the house, the Association hired a live-in house director for the Local Chapter and prepared the written employment contract. RP 700:3-12; 731:7-24; 1246:8-13, 20-23; see also CP 1215 (Ex. 5) (supplemented Feb. 24, 2014). The live-in house director was at the house daily, was responsible to the Association board, acting as another set of eyes and ears for the Association, and was required to keep the Association advised as to the condition of the house. RP 700:13-19; 703:9-20; 1249:22-1250:1-8; CP 1215 (Ex. 5).

The Association also hired and paid for local property managers to regularly visit the house, and collect the monthly rent and security deposits from the individual members. RP 698:1-13; 705:5-12; 1225:1-12. During the 2007-2009 school years, Association board members assumed all the local property management duties. RP 698:14-699:24. All rent and security deposits collected were deposited into the Association's bank account. RP 705:13-17. The Association also assumed responsibility

to collect all Fraternity house bills and paid the house utilities. RP 696:3-6. When membership levels were insufficient to cover the \$84,000 annual rent on the house, the Association paid the difference. RP 1258:25-1259:1-21; 1260:2-10; CP 1064.

The Association did not need pre-approval to enter the house and shared joint access to all common areas. RP 691:21-692:9; 699:6-10; 1248:12-14. The Association had a chapter advisor visit the house every week, RP 700:7-8; 1249:15-21, and the Association's board of directors were encouraged to regularly visit the house to make sure the common areas looked presentable. RP 691:21-692;1-9.

**b. Procedural History**

Ms. Mitchell filed her lawsuit against the Association and its related national level fraternity (Theta Xi Fraternity). CP 9-11. Ms. Mitchell also named the local housing corporation that owned the Fraternity house (Chi Deuteron Chapter, Inc.) and its related national level fraternity (Grand Chapter of Phi Sigma Kappa, Inc.). *Id.* The

parties agreed to dismiss the Grand Chapter of Phi Sigma Kappa, Inc and the trial court dismissed Chi Deuteron Chapter, Inc. on summary judgment. The trial court also granted the national-level Theta Xi Fraternity a directed verdict, leaving the Association as the only remaining defendant.

After seven days of trial, the jury concluded that the Association was a possessor of the house, that the Association was liable, and that Ms. Mitchell was not contributorily negligent. CP 1537-39. A judgment was entered on Ms. Mitchell's jury verdict award. CP 1820-25. The Association appealed.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The Court of Appeals reviews de novo the trial court's decision denying a CR 50 motion for judgment as a matter of law. *Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wash.App. 227, 240, 95 P.3d 764 (Div. 1 2004). Judgment as a matter of law may be granted at the close of plaintiff's case if “there

is no legally sufficient evidentiary basis for a reasonable jury to find" for the plaintiff. *Id.*, citing CR 50(a)(1). The reviewing court views conflicting evidence in the light most favorable to the nonmoving party. *Id.* (citations omitted). The court "must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *Faust v. Albertson*, 167 Wash.2d 531, ¶ 10, 222 P.3d 1208 (2009). If any justifiable evidence exists upon which reasonable minds might reach conclusions to sustain a verdict, the question is for the jury. *State Farm Fire & Cas. Co. v. Huynh*, 92 Wash. App. 454, 465, 962 P.2d 854 (1998).

The decision to admit evidence "lies largely within the sound discretion of the trial court and will only be reversed upon a showing of abuse of that discretion." *Hume v. Am. Disposal Co.*, 124 Wash. 2d 656, 666, 880 P.2d 988 (1994) (additional citations omitted). A trial court abuses its discretion only when it takes a view that no

reasonable person would take. *Brunridge v. Flouor Fed. Servcs., Inc.*, 164 Wash.2d 432, ¶ 32, 191 P.3d 879 (2008).

**B. Appellant has waived its right to claim that a non-party was liable to Ms. Mitchell on her claim.**

Other than comments during the Association's opening and closing arguments, which are not evidence, the Association raises for the first time on appeal that the Local Chapter was responsible for the injuries caused to Ms. Mitchell. The appellate court "may refuse to review any claim of error which was not raised in the trial court" and should do so here. RAP 2.5(a). The Association did not raise the non-party defense in its pleadings or any motion before the trial court. CP 40-41.

The Association did not raise its non-party theory in its pleadings as required by CR 8(c), which requires that "a party shall set forth affirmatively . . . fault of a non-party". CR 12(i) also states that when a party intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense that shall be affirmatively pleaded by the party making the claim. CR

12(i) further requires that the identity of any nonparty claimed to be at fault also be affirmatively pleaded. The Association also failed to move to add the Local Chapter as a third-party under CR 14.

Because of the Association's failures, there is no trial court ruling on the Association's non-party defense for the Court of Appeals to review, and Ms. Mitchell requests this court refuse to so do under RAP 2.5(a).

The Association clearly understood the affirmative pleading requirement, as exhibited by its second affirmative defense in its answer, which identified two other entities as at-fault parties. CP 40:5-8. By failing to affirmatively identify the Local Chapter in its pleadings, the Association has waived its right to claim that the Local Chapter was the party in possession and control.

In *Henderson v. Therell*, 80 Wash.App. 592, 621-25, 910 P.2d 522 (Div. 3 1996), the defendant appealed a jury award for more than \$3 million, contending the trial court erred by failing to permit the jury to allocate fault to a potential responsible third party. The

defendant failed to raise the issue as an affirmative defense in his responsive pleadings, and as a result the Court of Appeals held that the defendant had waived this defense. See also Tegland, Karl B., 3 Wash.Prac. CR 12, cmt. 13 (7<sup>th</sup> ed. 2013).

In addition, the Association cannot be heard to argue that its allegation that Ms. Mitchell sued the wrong party does not implicate the Local Chapter for purposes of RCW 4.22.070 and CR 12(i). See e.g. Theta Xi Assoc. Br. 7-9 (Jan. 31, 2014) ("a fatal flaw in Appellee Mitchell's case is that she sued the wrong parties. . . the evidence is undisputed that the entity "in occupation of the land" was non-party Omega Chapter of Theta Xi Fraternity, a distinct and entirely separate entity from Omega of Theta Xi Association").

The Association cannot have it both ways. If the Association intended to claim that a third party was liable to Ms. Mitchell on her premises liability claim, then the Association was required to identify it in its pleadings. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 25-26, 864 P.2d 921 (1993) (refusing to allow

a change of legal theory on appeal and confirming that "RCW 4.22.070 is not self-executing" and that "it is incumbent upon the defendant to provide proof that more than one entity was at fault").

Furthermore, the jury concluded that Ms. Mitchell was not contributorily negligent, CP 1538, making the Association jointly and severally liable even if its non-party argument was allowed. Pursuant to RCW 4.22.070(1)(b), joint and several liability remains for an at fault entity when a "fault-free claimant is injured."

*Henderson*, 80 Wash.App. at 623, 910 P.2d 522. Thus, even if the Local Chapter was liable, and had fault attributed to it, the Association still would be jointly and severally liable because, as the jury concluded, the Association's negligence caused Ms. Mitchell's injuries. CP 1537-38.

Ms. Mitchell further requests the Court take judicial notice under ER 201(f) that the Local Chapter is not a recognizable legal entity that could be sued. The Local Chapter, at most, consists of a group of young male students who have graduated and disbanded, or,

as described by the Association's counsel, were a "fiscally, immature group of young men." RP 1480:13. The Local Chapter is not registered with the Washington Secretary of State and does not have a registered agent for service, which fact is properly confirmed by a simple search at [http://www.sos.wa.gov/corps/corps\\_search.aspx](http://www.sos.wa.gov/corps/corps_search.aspx). ER 201(b)(2) and (d).

**C. The trial court properly denied the Association's motion for a directed verdict because the Association had control and possession of the Fraternity house.**

The parties agree that the trial court correctly instructed the jury that an "occupier or possessor of property" is "(a) a person who is in occupation of the land with intent to control it". CP 1536; RP 1530-31; Assoc.'s Br. 8-9. Ms. Mitchell disagrees that she "was required to provide 'substantial evidence'" of possession, Assoc. Br. 8 (citing *Kinney v. Space Needle Corp.*, 121 Wash.App. 242, 249-50, 85 P.3d 918 (Div. 1 2004)), and that the trial court erred because "there is no evidence, much less 'substantial evidence', that Appellant Omega of Theta Xi (Association) possessed the property". Assoc. Br.

9. The Association's "substantial evidence" standard has no legal precedent; the *Kinney* decision cited by the Association does not even contain the word "substantial".

Sufficient evidence supports the court and jury's conclusions, CP 1537, that the Association was a "possessor" of the property. *Gildon v. Simon Property Group, Inc.*, 158 Wash.2d 483, ¶ 20, 145 P.3d 1196 (2006) (stating that "under long-standing law, the test in a premises liability action is whether one is the "possessor" of property, not whether someone is a "true owner" (the titleholder of property)", and further, at ¶ 21, that "[p]ossession of land, giving rise to the duty of care, does not require actual title or ownership") (other citations omitted). The evidence, including the Association's admissions, demonstrate that it was a possessor of the property. For example, Mr. Zaremba, the Association treasurer and designated CR 30(b)(6) representative, testified that the Association was in fact the tenant (with Chi Deuteron Inc. the lessor). RP 707:3-8. The Association also admitted that it "had a right to joint access to the

house with the members . . . as to the common areas," RP 697:7-11, including the halls and doors that exit those halls, RP 693:15-18; RP 728:2-5.

The Association also drafted the "Individual Housing Agreements" (to be signed by all student members). While the Individual Housing Agreement provides that the Local Chapter is the lessor (and Local Chapter members lessees), this was clearly form over substance, as Mr. Zaremba testified that the Association was in fact the lessor that rented the house to the student members. RP 691:5-8. This agreement also requires all Local Chapter members to comply strictly with the "rules, regulations, and by-laws" of the Association. CP (Ex. 18); RP 701:15-17.

As further evidence of the Association's possession and control of the house, the Association hired a "House Director" to live in the house full time to ensure compliance with the Association's extensive rules and regulations. RP 700:7-16; CP (Ex. 5). The written employment agreement provides that "the House Director

derives his authority from and serves at the pleasure of the Omega of Theta Xi Association Board of Directors," CP (Ex. 5), and the live-in Directed acted as "another set of eyes and ears for the Association", RP 700:17-19. The fact the Association hired a live-in employee, provided him housing inside the house, and vested him with authority to monitor, enforce, and report on the property's condition, demonstrates sufficient evidence of "possession and control" to submit the issue to the jury.

The Association retained ultimate control of nearly every aspect of the house, including collecting the monthly rent payments and all security deposits, both of which were deposited into the Association bank account, RP 705:5-17, collecting and paying house bills, including house utilities, RP 696:3-6, and controlling the process for making repairs to the property. RP 690-91; 704:10-19; RP 1196:2-5; RP 1202:9-12; RP 1226:21-25.

The Association's president, Curt Anderson, also issued an executive order which the Local Chapter members were required to

obey. RP 1216:14-18; RP 723:15-725:21; RP 1478:25-1479:1. The Local Chapter student elected president, Daniel Forsmann, testified that the Local Chapter members abided by "a very large set of rules [. . .] a lot of them were from our . . . association." RP 1216:22-24. The Association exercised its control by issuing policies, rules, and regulations, violations of which were subject to oversight, reporting, and consequences.

The Association's counsel acknowledged that the Association provided "guidance, financial support and mentorship" to its student members, RP 1480:17-18, found them housing, RP 1480:24, and ultimately purchased the fraternity house for the chapter members in March 2011, RP 1480:25-1481:1; CP 1077-1085.

Despite this evidence of possession and control, including the Association's admissions that it was a tenant (leasing from Chi Deuteron Inc.) shared joint, unrestricted access and possession of the house, RP 693:15-18; 697:7-11; 728:2-5, and retained ultimate control of nearly every aspect of the Fraternity house, the

Association continues to argue form over substance, asserting at least four times that the record completely lacks evidence that it had possession of the house. See Assoc. Br. 7 ("no evidence was presented that Appellant Omega of Theta Xi Association was in possession of the property"), Assoc. Br. 7, ("no witness testified that Omega of Thea Xi Association was in possession or control of the property"), Assoc. Br. 8, ("Appellee Mitchell failed to present any evidence that Appellant Omega of Theta Xi was 'in occupation of the land with intent to control it'"), and Assoc. Br. 9, ("there is no evidence, much less 'substantial evidence', that Appellant ... possessed the property"). These repetitive assertions lack factual foundation in the trial court proceedings and have not been made as good faith arguments for the extension of existing law.

**D. The trial court did not abuse its discretion regarding admissibility of the lease because the Association did not renew its request for admission.**

The Association argues that "midway through trial, the trial court decided to exclude perhaps the most vital piece of evidence in

this case: the lease for the subject property." Assoc.'s Br. 10, citing RP 639:19-20. The Association identifies no other location in the record to support its argument. In fact, the trial court never excluded the lease and ruled only that, "I'm keeping the lease out *until I can be convinced it's admissible*." RP 639:19-20 (emphasis added). The trial court reserved ruling based on the immediately preceding representation by the Association's counsel that she was "more than happy to not use the lease until [the witness] has addressed those issues [related to foundation]", RP 638:24-25, and further that the witness "will be here to explain exactly what he said, why he said it, and what the lease says. And I'm happy to not discuss that lease until you've heard his testimony", RP 639:15-18.

Despite the foregoing, the Association never called the witness or otherwise moved to admit the lease. *Wagner v. Wagner*, 1 Wash.App. 328, 332, 461 P.2d 577 (Div. 1 1969) (any alleged error on admissibility of evidence is waived when trial court reserves final ruling and counsel then fails to bring the matter to the court's

attention again). The trial court even later reminded the Association counsel that it had "reserved ruling" on admissibility of the lease. RP 961:25-962:1. The Association's failure to seek admission (or tactical decision not to) does not constitute appealable error by the trial court. RAP 2.4(b).

The Association claims that the lease is a "crucial piece of evidence" that would have "fundamentally impacted the outcome of the case." Assoc. Br. 11. In making this bold assertion, the Association conveniently ignores its designated representative's own testimony that the Association was the tenant of the property owner, RP 702:21-24; RP 707:308, and that it was the Association that rented the house to the Local Chapter members, RP 691:5-8.

The Association's decision not to seek admission of the lease may also have been due to the court's comment that, "[q]uite frankly, if the lease was admitted, I would say it very clearly designates this Association as a tenant." RP 962:5-7. Because the Association failed

to later move for admission of the lease, the trial court cannot be held in error now for the Association's tactical decision or omission.

Finally, even if the trial court's unequivocal "reserved ruling" and related reminder could be construed as an exclusion of the lease from evidence, such exclusion was harmless. ER 103(a). Even without the lease the Association argued during closing that the Local Chapter leased the house to its members, that the Local Chapter lived in, occupied and possessed the house, and that Ms. Mitchell had sued the wrong party. RP 1478:20-1481:9.

**E. The Association faults the trial court for excluding inspection reports, when in fact, the trial court unequivocally allowed the reports into evidence and the Association even used the reports as evidence.**

Appellant argues, without citation to the record, that the trial court excluded house inspection reports from evidence. Assoc. Br. 12-13. The Court in fact ruled that the inspection reports and related testimony were "very clearly admissible [ . . . ] I'm going to allow that type of evidence to come in." RP 100:10-16. The trial court also stated "I'm letting the fire report, insurance report, clean bills of

health or whatever you want to call it come in." RP 111:4-8. The Association's counsel has failed to identify with sufficient explanation what ruling the Association claims to be erroneous. In the event that the Association's reply brief provides a record cite to supports this claim of error, Ms. Mitchell will request an opportunity to respond.

However, witnesses testified about the inspection reports, and the trial court admitted the report offered by the Association. See, e.g., RP 644:14-23; 649:5-8 (Association cross-examines Ms. Mitchell's expert about his review of the fire department's annual inspections); RP 645:9-649:4; 684:18-685:6 (Association cross-examines Ms. Mitchell's expert regarding inspections by HRH, a commercial property inspector); RP 1229:17-1235:20; CP 1518 (Association discusses and admits into evidence through its own witness the Pullman Fire Department inspections as Exhibit 223); RP 1238:20-1240:1-13 (Association's witness discusses fire inspections and reports completed internally by the owner).

Appellant's argument regarding the inspection reports lacks good faith and has no factual foundation in the trial court record. All inspection reports the Association offered were admitted into evidence. Mitchell requests sanctions for having to respond to this issue pursuant to RAP 18.

**F. The trial court did not abuse its discretion by admitting evidence that Ms. Mitchell and her friend had been invited to the Fraternity house.**

The Association claims that the trial court abused its discretion by allowing Ms. Mitchell's friend, Chezny Goble, to testify that they were invited to the house by a member of the Local Chapter. Assoc. Br. 16, 17. This testimony was admissible because the invitation (1) was not offered to prove the truth of the matter asserted, (2) was "not hearsay" under ER 801(d)(2) because the invitation was made by a member of the Association with authority to invite guests to the party, and (3) even if hearsay, its admission into evidence was cumulative and therefore harmless.

*(1) The Local Chapter member's invitation to the young women was not hearsay because it was*

*not offered to prove the truth of the matter asserted.*

The trial court concluded, in part, that the Local Chapter member's statements of invitation were admissible as an "operational fact." CP 66:15-68:1. The "operational fact" refers to the general rule that statements that are "in issue" or have independent legal significance are not hearsay. See Tegland, Karl B., 5B Wash. Prac., Evidence Law & Prac. § 801.10 (5<sup>th</sup> ed. 2013), citing Broun, *McCormick on Evidence* § 249 (6<sup>th</sup> ed.); see also Tegland, Karl B., 5C Wash. Prac. § 803.70, fn. 6 (5<sup>th</sup> ed. 2013), with cross references on "operational fact" doctrine.

For example, in *Cranwell v. Mesecc*, 77 Wash.App. 90, 890 P.2d 491 (Div. 1 1995), the Court concluded that the tenant's statements of consent to inspections were not offered for the truth of the matter asserted. "Rather, they [we]re offered as proof that the statements were made, which is in itself significant to the ultimate factual determination of whether the city was permitted to conclude the tenants had consented to an inspection of their units." *Id.* at 101.

Here, proof that the invitation was made is in itself significant to the determination of whether Ms. Mitchell and her friends were justified in their belief that they had permission to enter the Fraternity house.

Similarly, in *Moolick v. Lawson*, 33 Wash.App. 665, 655 P.2d 1185 (Div. 3 1982), the defendant testified as to a third person's out-of-court statement. The Court held that the third person's extrajudicial statements were not hearsay and were admissible because they were introduced to prove why the defendant believed he had permission to move the trailer, and not to prove the truth of their content. *Id.* at 668. Similarly, Mr. Gilbertson's extrajudicial statements were not hearsay "because they were introduced to prove why" the two young women believed they had permission to enter that house and "not to prove the truth of their content." *Id.*

(2) *The testimony was "not hearsay" by definition under ER 801(d)(2) because it was an admission by a party-opponent.*

The invitations are not hearsay because they are admissions by a party opponent. ER 801(d)(2). The Association argued in its

motion in limine that Mr. Gilbertson lacked authority to invite young women to the house. CP 1357:1-1358:5. The Association's claim lacks factual support and is directly contradicted by the deposition testimony of the 2008 Local Chapter president, who testified that members did not need pre-approval to invite guests into the house, including those members that did not live in the house. CP 1443:27-1444:16. He also testified that "of course we don't prevent anybody having their friends over to have something going on on their own accord." RP 1243:3-5.

The Association presented no evidence (by declaration or affidavit) that Mr. Gilbertson, a member of the Local Chapter, lacked authority to invite the young women to the house. CP 1357-58; RP 55:7-13. A statement is not hearsay if its was "by a person authorized by the party to make a statement concerning the subject," or "by the party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2)(iii-iv).

The Association will likely argue that even if Mr. Gilbertson can bind the Local Chapter, he has no authority to act for the Association. However, Association officers testified that all members of the Local Chapter (including Mr. Gilbertson), are also members of the Association, RP 690:4-7, and, as an agent of the Association, was acting within his authority to make the invitation. This is evidenced by the fact that the Association was aware that students invited guests to the house for social events. RP 729:17-24; 730:10-15. Consequently, Mr. Gilbertson's invitation to the young women is admissible pursuant to ER 802(d)(2) and would be admissible regardless under ER 803(a)(3) as a statement relevant to Mr. Gilbertson's then state of mind or belief that he had authority to invite guests to the dance at the house.

(3) *Even if the testimony was erroneously admitted, the error was harmless.*

Only evidentiary rulings that affect a substantial right of the party constitute reversible error. ER 103(a). This Court reviews "a trial court order or ruling . . . if . . . the order or ruling prejudicially

affects the decision designated in the notice." RAP 2.4(b). The erroneous admission of merely cumulative evidence does not constitute reversible error. *Boeing Co. v. State*, 89 Wash.2d 443, 452, 572 P.2d 8 (1978).

As additional grounds for its decision, the trial court referred to Ms. Goble's testimony that women were always invited to fraternity parties, based on Ms. Goble's experience and understanding as a sorority women at Washington State University. CP 602; RP 68:2-14; RP 296:23-297:4; RP 303:6-10. Furthermore, Ms. Goble had also received an invitation to the dance at the house a couple days earlier. RP 295:5-17. The Association did not object as to these statements, RP 295:5-17, and cannot raise objection now, pursuant to ER 103(a)(1). Accordingly, the Association waived its hearsay objections, and regardless, admission of the statements was cumulative, and any error was harmless. See *In re Bond Issuance*, 175 Wash.2d 788, ¶ 40, 287, P.3d 567 (2012).

**G. Ms. Mitchell requests attorney fees under RAP 18.**

Ms. Mitchell requests attorney fees as a sanction against the Association for filing this appeal under RAP 18. To determine whether an appeal is sufficiently frivolous to warrant sanctions, the court considers: (1) a civil appellant has the right to appeal; (2) any doubt as to whether the appeal is frivolous is resolved in the appellant's favor; (3) the court must consider the record as a whole; (4) an appeal is not frivolous simply because it is affirmed and its arguments are rejected; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Streater v. White*, 26 Wash.App. 430, 435, 613 P.2d 187 (1980); *Holiday v. City of Moses Lake*, 157 Wash.App. 347, ¶ 27, 236 P.3d 981 (Div. 3 2010); RAP 18.9(a).

The Association's brief raises its non-party argument for the first time on appeal, after failing to identify the non-party affirmatively as required under CR 8(c) and CR 12(i). On appeal, the

Association fails to identify a ruling by the trial court as to the non-party upon which it assigns error for this Court to review. The Association's "substantial evidence" argument on the jury issue of whether it was a possessor lacks legal authority and good faith argument for the extension of existing law; particularly in light of the overwhelming evidence of the Association's possession and control of the house, including its admissions that it was a tenant with unrestricted access to the house.

Similarly, the Association's second and third assignments of error, relating to the lease and inspection reports, lack a factual basis in the trial court proceedings, as the trial court made no such rulings. The Association's final hearsay argument, even if correct, would constitute harmless error without any reasonable possibility of reversal of the jury's verdict. The Association's arguments are not supported by the factual record or are not supported by the law or good faith argument for its extension, violating CR 11 (*Yurtis v. Phipps*, 143 Wash.App. 680, ¶ 41, 181 P.3d 849 (Div. 3 2008) ("A

frivolous action is one that cannot be supported by any rational argument on the law or facts"). CR 11 is a "recognized ground in equity" for which appellate attorney fees can also be granted under RAP 18.1. *Eller v. East Sprague Motors & R.V.'s Inc.*, 159 Wash.App. 180, ¶ 32, 244 P.3d 447 (Div. 3 2010).

## V. CONCLUSION

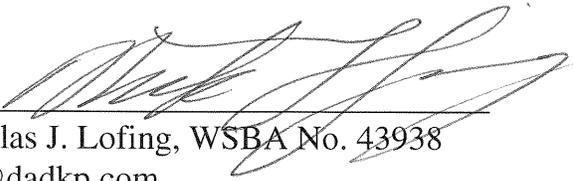
Mitchell requests this Court uphold the jury verdict awarding her damages for the permanent injuries she suffered over 5 years ago. The "nonparty" now blamed by the Association does not actually exist, the Association is barred by CR 12(i) from raising the claim now, and sufficient evidence supports the trial court's refusal to direct a verdict to the Association, particularly when viewed in the light most favorable to Ms. Mitchell, as is applied to review of a CR 50 motion. The Association's evidentiary challenges lack a factual basis or fail to show an abuse of discretion or prejudicial error. Because of the Association's failure to cite a factual basis for its assignments of error, because of its failure to cite legal authority to

supports its arguments, and because there are no debatable issues upon which reasonable minds might differ and no reasonable possibility of reversal, Ms. Mitchell requests that the trial court be affirmed and she be awarded her attorney fees and costs on appeal.

Respectfully submitted this 27<sup>th</sup> day of February, 2014.

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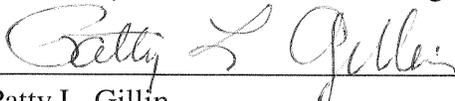
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

<input checked="" type="checkbox"/> First Class U.S. Mail	Attorney for Appellants: Pamela M. Andrews Stephen G. Skinner Andrews Skinner, P.S. 645 Elliott Ave. W, Suite 350 Seattle, WA 98119
<input type="checkbox"/> Facsimile	
<input type="checkbox"/> Legal Messenger	

DATED this 27<sup>th</sup> day of February, at Wenatchee, Washington.

  
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Patty L. Gillin