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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

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 GRANT CHAPTER OF PHI SIGMA KAPPA, INC., a Delaware nonprofit corporation; JOHN DOES 1-10; and ABC COMPANIES 1-5,

Defendants/Appellants.

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

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I. INTRODUCTION

This case does not present a complex appellate issue but instead presents the most fundamental and straightforward issue possible: was the party against whom a judgment was entered even a proper party to the lawsuit?

Due to a series of legal errors, Appellee Megan Mitchell was allowed to obtain a judgment against the incorrect party. Specifically, in a premises liability action, only the entity that is in control or the possession of a property may be held liable for personal injuries. Here, however, Appellant Omega of Theta Xi Association (“Omega of Theta Xi”) was not a tenant, did not sign a lease, and exercised zero control over the property where Ms. Mitchell was injured.

The above legal error was compounded by the fact that the trial court erroneously prevented Appellant Omega of Theta Xi from using the lease for the subject property as evidence of the true entities in possession the property at the time of Ms. Mitchell’s accident. The trial court’s evidentiary ruling was an abuse of discretion because the lease would have allowed Appellant Omega of Theta Xi to conclusively prove that it was not the responsible party [the lease specifically identified an unincorporated association as the lessee of the subject property]. Fundamentally, Appellee Megan Mitchell sued the wrong party and

Appellant Omega Theta was improperly forced to bear the cost of Appellee Mitchell's tactical error.

In addition to the above legal errors, the trial court also unfairly tilted the balance in favor of Appellee Mitchell by excluding key pieces of evidence [inspection reports regarding safety on the property] that would have allowed Omega of Theta Xi to present a much stronger defense at trial. The trial court simultaneously allowed Appellee Mitchell to present hearsay evidence regarding an alleged invitation to the subject property, which effectively prevented Appellant Omega of Theta Xi from correctly asserting that Ms. Mitchell was a trespasser at the time of the accident. The trial court's inequitable evidentiary rulings represent an abuse of discretion and prevented Appellant Omega of Theta Xi from receiving a fair trial.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in refusing to dismiss Appellee Mitchell's claims against an entity that was not in possession or control of the subject property?

2. Did the trial court err in preventing Appellant from introducing into evidence a lease that documented control / possession of the property to a non-party?

3. Did the trial court err in preventing Appellant from

submitting annual inspection reports regarding the overall safety of the property?

4. Did the trial court err by allowing Appellee's close personal friend to testify regarding hearsay statements about an alleged invitation to the subject property?

III. STATEMENT OF THE CASE

This is a premises liability action involving an accident where Appellee Megan Mitchell sustained injuries. On September 27, 2008, Ms. Mitchell and her friend Chezny Goble attended a party at a house owned by a dismissed Defendant, Chi Deuteron, and leased by **non-party** Omega Chapter of Theta Xi Fraternity. CP 14; CP 705 [lease], and CP 1333 [same] After Plaintiff arrived at the house, she proceeded to the third floor where Plaintiff alleges a dance was taking place. Plaintiff did not know any Theta Xi members who were at the house at that time. After staying at the House for a short time, Plaintiff decided to leave, and told the other members of her group goodbye. Plaintiff walked down a stairwell and exited the house through the regular ground-floor entrance. CP 14.

Plaintiff then separated from her friend Ms. Goble and attended a party at another friend's house. Plaintiff stayed at the party for approximately one hour, until she was contacted by Ms. Goble who wanted to go back to the Theta Xi house. Plaintiff went back to the Theta

Xi house with Ms. Goble, and they were joined by a third person, Kris Herda. Mr. Herda was not a resident of the fraternity and did not have permission or authority to allow Plaintiff access to the home. There is no evidence that the Plaintiff was invited to the House at this late hour. Rather, without authorization, Plaintiff boldly opened the back door and walked up to the third floor of the House. Verbatim Report of Trial Proceedings (hereafter “RP”) at 303-4.

After staying at the house for only 10 minutes, Ms. Mitchell decided to leave for a second time. CP 14. After wandering the House without permission [including nearby residents’ private bedrooms], Ms. Mitchell attempted to exit through a fire escape on the second floor of the building. Ms. Mitchell was aware of and had used the regular ground floor entrance/exit at least three times that very evening prior to attempting to exit through the second floor fire escape. After opening the fire escape door and stepping on to a platform outside the House, Ms. Mitchell fell down the fire escape and sustained injuries. CP 14.

At the time of Ms. Mitchell’s accident, the subject property was owned by Chi Deuteron Chapter, Inc./Phi Sigma Kappa [collectively “Chi Deuteron”]. Chi Deuteron was a named defendant in this action but was dismissed on summary judgment upon the court’s ruling that although it owned the property it did not have control over the property at the time of

the events here at issue and therefore owed no duty to plaintiff. Prior to the accident, property owner Chi Deuteron leased the property to **non-party** Omega Chapter of Theta Xi Fraternity. CP 692. The lease agreement at issue contained a 24-month term commencing on August 1, 2007 and ending on July 31, 2010. CP 716. The lease was terminated when Chi Deuteron sold the property. Appellant Omega of Theta Xi Association was **not** a party to the lease and had no right to occupy or control the subject property.

Prior to trial, the trial court granted property owner Chi Deuteron's motion for summary judgment. CP 1398-9. The trial court dismissed Chi Deuteron even though it was property owner Chi Deuteron's sole decision to install an allegedly defective fire escape many years prior to Theta Xi's tenancy. CP 377. Chi Deuteron also continued to exercise control over the fire escape by directing professionals to annually inspect the exterior of the building, including the fire escape. CP 377-8. It is undisputed that Appellant Omega Chapter of Theta Xi, by contrast, was not involved in any way with the decision to install the subject fire escape. Pursuant to the terms of the lease, only building owner Chi Deuteron had the ability to alter, modify, and ultimately fix the fire escape. Under the terms and conditions of the lease, Chi Deuteron's tenants were specifically prohibited from making "alterations, improvements or additions" to the

property:

Alterations or Improvements: The Chapter and each Individual shall not have the right to make alterations, improvements or additions to the Premises except for those in consultations with and pursuant to the House Corporation's written consent. If alterations, improvements or additions are made without the House Corporation's written consent, the House Corporation shall have the right to terminate this Chapter House Lease Agreement...

CP 709-10.

On June 13 2013, after the close of Appellee's case, Appellant Omega of Theta Xi moved, pursuant to CR 50(a)(1), for judgment as a matter of law on Appellee's premises liability claim arguing that Appellee's claims should be dismissed in their entirety against Omega of Theta Xi Association. The trial court denied the motion and instead allowed the matter to proceed to the jury.

On June 18, 2013, the jury reached a verdict in favor of Appellee Megan Mitchell. The trial court subsequently entered a judgment on the jury's verdict, which lists Megan Mitchell as judgment creditor and Omega of Theta Xi Association as judgment debtor. CP 1821. All other defendants in the case were dismissed prior to submission of the case to the jury.

As is explained in the pages that follow, Omega of Theta Xi

Association (1) was not a party to the subject lease; (2) never occupied or possessed the subject property; and (3) was not an entity against whom a premises liability claim could be maintained.

IV. ARGUMENT

A. Standard of Review.

The trial court's decision denying Appellant Omega of Theta Xi's CR 50(a)(1) motion for judgment as a matter of law is reviewed *de novo*. *Estate of Bordon ex rel. Anderson v. State, Dep't of Corr.*, 122 Wn.App. 227, 240, 95 P.3d 764 (2004). The trial court's decision to exclude evidence is reviewed under the abuse of discretion standard. *Kappelman v. Lutz*, 167 Wash. 2d 1, 6, 217 P.3d 286 (2009).

B. Appellant Omega of Theta Xi Should Have Been Granted Judgment as a Matter of Law Pursuant to CR 50(a)(1).

A fundamental and necessary element of any premises liability claim is proof of duty. Specifically, a possessor of property owes certain duties to trespassers, invitees, and licenses on their property. *See Coleman v. Hoffman*, 115 Wn.App. 853 (2003) *citing* Restatement (2d) of Torts. An entity that is not in possession or control of property generally does not owe a duty to trespassers, guests, invitees or licensees. *Id.* Here, a fatal flaw in Appellee Mitchell's case is that she sued the wrong parties. Specifically, no evidence was presented that Appellant Omega of Theta Xi

Association was in possession of the property where Megan Mitchell was injured. In fact, the evidence [erroneously excluded by the trial court] confirmed that the true possessor of the property was a non-party to this action.¹ Fundamentally, Appellee Mitchell was unable to prove the most basic element [duty] of a premises liability claim and her claim should have consequently been dismissed.

Under Washington premises liability law, in order to prove ‘duty’ Appellee Mitchell was required to provide ‘substantial evidence’ that one of the named defendants possessed the property. *See Kinney v. Space Needle Corp.*, 121 Wn.App. 242, 249-50, 85 P.3d 918, 921-22 (2004) (“Further, our Supreme Court has adopted sections 343 and 343A of the Restatement (Second) of Torts to define a landowner's duty to invitees”). At trial, no witnesses testified that Omega of Theta Xi Association was in possession or control of the property. Similarly, Appellee Mitchell failed to produce an exhibit, such as a lease, or a witness to testify that Appellant Omega of Theta Xi possessed or controlled the property.

Under Washington law, a possessor of land is:

- (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has

¹ The trial court’s decision to exclude the lease, a key piece of evidence in a premises liability action involving the alleged lessee, was an abuse of discretion. This issue is addressed in the immediately following section.

subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

See Coleman v. Hoffman, 115 Wn.App. 853 (2003) quoting Restatement (2d) of Torts, §328E. Throughout the history of this litigation [including at trial], Appellee Mitchell failed to present any evidence that Appellant Omega of Theta Xi was “in occupation of the land with intent to control it.” *Id.* In fact, 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.

Plaintiff’s failure to sue the right parties in this case is fatal to her ability to prove a necessary element [duty] of a premises liability claim. Again, because Appellee sued a party who never possessed or controlled [also not the lessee of] the subject property, she is unable to maintain a premises liability claim. A fundamental requirement to prove duty is proof of ‘possession’ of the property. Because there is no evidence, much less ‘substantial evidence’, that Appellant Omega of Theta Xi possessed the property, it was error for the trial court to deny Appellant’s CR 50(a)(1) motion for judgment as a matter of law.

C. The Trial Court Abused its Discretion by Preventing Appellant Theta Xi from Using the Lease as Evidence at Trial.

On June 12 2013, 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. *See* 6-12-13 RP at p. 639:19-20. Counsel for Appellant Omega of Theta Xi presented extensive argument on the lease's admissibility. It is also worth noting that in response to ER 904 submissions identifying the lease, Appellee Mitchell waived any objection on its admissibility: "Lease Agreement between Chi Deuteron and Theta Xi (May 3, 2006). Plaintiff has no objection to authenticity or admissibility." CP 692. Appellee made the same note with respect to the 2007 lease. *Id.*

The admissibility of a lease in a premises liability action involving the alleged lessee is a fairly straightforward issue. In an action against the alleged tenant of property, the lease provides some of the most relevant information about who leased the property, lease term, and the identity of the true possessor of that that property. The evidence is undeniably probative and relevant on 'possession' of property, which is a required element of any premises liability claim. Furthermore, the lease definitively identified a **non-party** to this litigation as the lessee possessor of the property. CP 705—identifying non-party "Omega Chapter of Theta Xi, an

unincorporated association of individuals” as the lessee.

At trial, and in its CR 50(a)(1) motion, Appellant Omega of Theta Xi intended to present the lease for the subject property as evidence about who was in possession of the property at the time of the accident. The subject lease conclusively demonstrates that the lessee in possession of the subject property at the time of Ms. Mitchell’s accident was Omega Chapter of Theta Xi Fraternity, an unincorporated association of individuals who was never a party to this lawsuit. The trial court erroneously barred Appellant Omega of Theta Xi from introducing the lease into evidence. This error fundamentally impacted the outcome of this case because it deprived the jury [and the trial court] from examining a crucial piece of evidence on control of the property. Ultimately, the fact that Appellant was not the lessee and was not the party in possession or control of the property at the time of the accident should have dictated dismissal of Appellee’s claims against Omega of Theta Xi.

As indicated above, the Court of Appeals reviews the exclusion of evidence based on the abuse of discretion standard. Here, Appellant Omega of Theta Xi submits that it was an abuse of discretion to exclude probative and relevant evidence on possession of the property. The trial court never conducted an ER 403 balancing test and elected not to specifically explain why it chose to exclude the lease. But, undeniably, in

a premises liability action involving the alleged lessee, a lease is relevant and critical evidence that goes to the heart of one of the most basic elements of the tort claim [possession/control]. The trial court abused its discretion in preventing Appellant from using the lease as evidence at trial.

D. The Trial Court Abused its Discretion by Preventing Appellant Omega of Theta Xi from Using Inspection Reports Regarding the Subject Property.

Appellant Omega of Theta Xi was prohibited from introducing key evidence regarding annual safety inspections of the subject property. The City of Pullman conducts yearly fire safety inspections of Greek Housing: the primary inspection happens the first part of October, a re-inspection, if needed, occurs 30 days later and a final inspection two weeks after the re-inspection. CP 1245 at Exhibit A to Dec. of Andrews.

On October 30, 2007, the Fire Department re-inspected the fraternity house and found certain areas out of compliance. CP 1245 Exhibit B to Dec. of Andrews. The house was re-inspected for the final time on November 15, 2007, and by December 19, 2007, was found to be fully compliant with the City's fire codes. CP 1245 Exhibit C and D to Dec. of Andrews.

The incident at issue occurred in the early morning hours of September 29, 2008. CP 14. On October 28, 2008, just one month later, the Pullman Fire Department completed its annual safety inspection at the

house and found it to be compliant with all applicable fire codes. CP 1245 Exhibit E to Dec. of Andrews.

In addition to the fire inspection reports, property owner Chi Deuteron also retained a commercial property inspection company, Hilb Rogal & Hobbs to annually inspect the property. RP 685. The annual property inspection reports confirmed that the property [including fire escape] was compliant with all applicable codes and regulations. An entity has the right to rely upon a report from the authority in charge of fire safety inspections in determining if the entity is in compliance with the code as respects signage, lighting and egress. *See J&B Development Co. v. King County*, 29 Wn.App. 942, 954-955 (1981). Although compliance with local codes and regulations and approval of the condition of a property by two independent entities is not dispositive of lack of negligence, it certainly is relevant and here Appellant Omega of Theta Xi should have been allowed the opportunity to present this evidence to the jury. Under these circumstances, Appellant Omega of Theta Xi submits that the trial court abused its discretion by excluding evidence that would have strongly supported Theta Xi's position on existence of an allegedly dangerous condition on the property.

E. The Hearsay Testimony of Chezny Goble Purporting to Invite Her and Her Friends to the Theta Xi Fraternity House Should Have been Precluded.

One of the most important issues in a premises liability case is the status of the injured party on the property at the time of the accident. Under Washington premises liability law, the duty owed to a trespasser is to refrain from willfully or wantonly injuring him/her. *Mail v. M R. Smith Lbr. & Shingle Co.*, 47 Wash.2d 447, 449, 287 P.2d 877 (1955). "A wanton act" is described as "one which is performed intentionally with reckless indifference to injurious consequences probable to result therefrom. *Evans v. Miller*, 8 Wn.App. 364 at 367, 507 P.2d 887 (1973) (citing *Adkisson v. Seattle*, 42 Wash.2d 676, 684, 258 P.2d 461 (1953)). "Willful" requires a premeditation of formed intention. *Adkisson v. Seattle*, 42 Wash.2d at 683. It is understood that the duties owed to a trespasser differ dramatically from those owed to a licensee or guest.

In this case, the **only** evidence that Appellee Mitchell was invited to the property [as opposed to being a trespasser] were inadmissible hearsay statements. Appellant Omega of Theta Xi moved to exclude the testimony of witness Chezny Goble [testified at trial via video perpetuation deposition] regarding hearsay statements purporting to invite Ms. Goble and her friends to the subject property. CP 1357-8. That motion was denied. Chezny Goble, a close personal friend of Appellee Megan

Mitchell, offered testimony to the effect that a Theta Xi member, Josh Gilbertson, who did not live in the Theta Xi house, invited Ms. Goble and Ms. Mitchell to an alleged party at the Theta Xi fraternity house on the night at issue to this litigation. *Id.* The alleged initial invitation, and alleged second, after-hours invitation were purportedly transmitted via text message. Importantly, Appellee never produced the alleged text messages, which were notably not presented as trial exhibits.

The trial court abused its discretion by allowing Ms. Goble's testimony as to what Mr. Gilbertson allegedly "texted" to Ms. Goble: these statements were hearsay and should have been excluded. ER 801. Mr. Gilbertson was not an officer of the fraternity and had no authority to invite guests into a house where he did not reside. Further, since the local chapter of Theta Xi, to which Mr. Gilbertson was a member, was NOT a party to the suit, and Mr. Gilbertson was NOT a member of the named defendants, his statements did not qualify as an exception to the hearsay rule.

Any representations allegedly made by Mr. Gilbertson to Ms. Goble are hearsay. ER 802. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless an exception applies. ER 802. Here, the testimony

improperly admitted by the trial court does not fall within any of the exceptions to the hearsay rule. Appellant Omega of Theta Xi properly objected to the testimony at the time of trial, and because the testimony was elicited through a video perpetuation deposition, Theta Xi directly opposed the testimony through a motion in *limine*. CP 1357.

The net effect of the trial court's erroneous ruling was to allow Appellee Mitchell to offer hearsay statements for the truth of the matter asserted. Specifically, using nothing other than hearsay statements, Ms. Goble testified that Ms. Mitchell was invited to the house on the day of her accident. RP at P. 295. This hearsay 'invitation' testimony essentially eliminated Appellant's near complete defense to liability based on Ms. Mitchell's status as a trespasser at the time of the accident. The facts confirmed that Ms. Mitchell was injured when she entered a home at 1:30 a.m. [after attending parties into the early morning hours] without permission and while accessing a fire escape on the second floor of the home, again without authorization or permission.

In addition to being inadmissible hearsay, the testimony from Ms. Goble should have been excluded because the testimony was also irrelevant in that Mr. Gilbertson not only had no authority to speak on behalf of Theta Xi, but he had no authority to invite others into a home where he did not live. As such, any invitation issued by him is irrelevant

as it cannot bind either defendant. ER 401, ER 402.

The trial court's erroneous decision to allow Appellee's close personal friend to offer hearsay statements regarding an invitation to the property was an abuse of discretion. Undeniably, the trial court's decision also fundamentally changed the outcome of this case. Even Appellee's counsel admitted that the hearsay testimony was the "...only evidence establishing my client's true status on the property." Appellee Mitchell's counsel admitted that without this hearsay testimony, Appellant Omega of Theta Xi would otherwise be entitled to a directed verdict. *See* 6-10-13 RP at p. 54. Without the hearsay testimony, there was no question that Ms. Mitchell was a trespasser at the time of the accident and her claims therefore would fail as a matter of law.

V. CONCLUSION

Appellee Megan Mitchell sued the wrong party. Appellant Omega of Theta Xi was not the lessee for the subject property, was not present on the day of the accident, and exercised zero control of the property. Based on these key facts, the trial court should have granted Appellant Omega of Theta Xi's CR 50(a)(1) motion for judgment as a matter of law. The trial court also abused its discretion by (1) excluding the one piece of evidence that would have allowed Appellant Omega of Theta Xi to prove that it was not the lessee of the subject property; (2) precluding Appellant from using

inspection reports regarding the overall safety of the property wherein two independent entities confirmed that the property [including subject fire escape] were compliant with local codes and regulations; and (3) allowing Appellee Mitchell to present hearsay testimony at trial that improperly suggested that Ms. Mitchell was something other than a trespasser at the time of the accident. The overall impact of the trial court's evidentiary rulings was to prevent Appellant from having a fair trial. Based on the above described legal errors, the only two appropriate remedies are either dismissal of Appellee's claims or a new trial.

RESPECTFULLY SUBMITTED this 31st day of January, 2014.

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