



OREGON LAW UPDATE

case in point...

No Prior Incident Required: Civil Liability for Criminal Acts of Third Parties (Part II)

From the desk of Jeffrey D. Eberhard: In the conclusion of this special two-part update, we discuss an important question brought before the Oregon Court of Appeals: Can a national organization be liable for the negligence of a local chapter, which led to an alcohol-related sexual assault of a guest, when the national organization provides significant guidance and warnings to local chapters about the dangers of alcohol and sexual assault?

Claims Pointer: As discussed in Part I of this update, this case involved a lawsuit against a college fraternity for allowing one of its members to become intoxicated, which led to sexual assault the plaintiff, who attended a party at the fraternity's chapter house. As discussed in last week's update, the Court of Appeals held that the local chapter's summary judgment motion should have been denied because it was potentially foreseeable to the local chapter that its failure to prohibit guests in members' rooms could lead to the plaintiff's injuries. In regards to the national fraternity, however, the Court of Appeals held (1) that the national fraternity could not be liable for the local chapter's conduct because the national chapter delegated day-to-day operations (including providing safety at parties) to the local chapters; and (2) that the national chapter was not negligent for failing to enforce its rules and guidelines on alcohol and sexual assault because it did not owe a duty to keep the plaintiff safe.

Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity, 273 Or App 390 (September 2, 2015).

On Halloween night, 2008, Ms. Scheffel, a student at Oregon State University ("OSU"), was sexually assaulted by Gregory Sako at a party hosted at Sako's fraternity, a local chapter ("Beta Chapter") of the Phi Kappa Psi Fraternity ("Phi Psi"). Phi Psi is a national fraternity with more than a hundred local chapters, including the Beta Chapter at OSU. While Phi Psi had the power to admit, suspend, and revoke local chapters, it left management and operation of its members up to local chapters.

Phi Psi required local chapters, including Beta Chapter, to review a risk management policy that set minimum standards for "Social Programming and Alcohol" and "Sexual Assault." The policy prohibits use of alcohol by minors. The sexual assault policy stated that alcohol "decreases inhibitions" and that "alcohol plays a prevalent role in sexual assaults." The policy also included a statistic that 97% of sexual assault cases brought against fraternities involve alcohol. Phi Psi required local members to take an online course cautioning them about alcohol use and sexual assault.

Sako became a member of the Beta Chapter in 2008 at the age of 19. Although underage alcohol use was prohibited in the fraternity house, it was well known that minor members, including Sako, drank regularly in their private rooms. In October, 2008, Sako was drinking anywhere from 4 to 20 drinks on the weekends. OSU's Office of Greek Life recommended to fraternities that they prohibit

access to private rooms and several sororities had such policies—however, Beta Chapter had no policy on access to private rooms.

On October 31, 2008, Beta Chapter and a sorority, Delta Chi, hosted a party at Beta Chapter's fraternity house. They hired security guards, required outside alcohol to be checked in to a bar; the bartender checked IDs and only allowed one drink per person at any given time; female and male bathrooms were designated on separate floors; and access to private rooms was limited to Beta Chapter members and guests.

By the time of the party at 9 p.m., Sako was heavily intoxicated and the president of Beta Chapter, Gerritz, sent him to his room. Gerritz stopped by Sako's room several times to make sure he was alright. Although the party was scheduled to go until midnight, Gerritz decided to shut the party down just before 11 p.m. because a large group of uninvited guests had brought alcohol just outside of the fraternity house.

At some point during the time that Gerritz was closing down the party, Sako returned to the dance floor without Gerritz's knowledge and met Scheffel, a Delta Chi guest. Scheffel followed Sako to his room where he sexually assaulted her.

Scheffel filed suit against Beta Chapter and Phi Psi. Scheffel alleged that Beta Chapter was negligent under a theory of premises liability or because the harm was generally foreseeable. Scheffel asserted claims against Phi Psi alleging (1) that it was liable for Beta Chapter's negligence

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because Beta Chapter was its agent and (2) that Phi Psi was itself negligent for failing to supervise Beta Chapter regarding Phi Psi's national policies on alcohol and social events.

Phi Psi moved for summary judgment. It argued that it could not be liable for Beta Chapter's negligence, if any, because it did not have or exert the right to control Beta Chapter's conduct. In response to the allegations that Phi Psi was negligent, Phi Psi argued that it did not undertake a duty to protect Scheffel through its alcohol and sexual assault prevention policies. The trial court granted the motion. Scheffel appealed.

The three-judge panel of the Court of Appeals unanimously affirmed the dismissal. First, Scheffel argued that Phi Psi was liable for Beta Chapter's conduct because Phi Psi had the power to discipline and revoke Beta Chapter's charter. Scheffel maintained that because Phi Psi imposed its alcohol abuse and sexual assault prevention policies on Beta Chapter, Phi Psi exerted control over Beta Chapter. Phi Psi responded that its governing documents only gave it authority to admit, suspend, discipline, and revoke local chapters—but left management of day-to-day operations up to each individual chapter. The Court agreed with Phi Psi, reasoning that because Phi Psi's control over Beta Chapter did not involve day-to-day operations, such as organization and implementation of the Halloween party, it could not be vicariously liable for Beta Chapter's conduct. Any power Phi Psi had over Beta Chapter was "remedial" in nature, because it could only react to violations of its policies, rather than control or stop improper behavior.

Second, Plaintiff argued that Phi Psi could be held negligent by failing to protect Scheffel from harm because it undertook a duty to supervise, control, and guide fraternity members when it provided education, guidance, and policies aimed at preventing alcohol abuse and sexual assault. Scheffel relied on a legal principle that when a person provides services for another, the person owes a duty to reasonably protect the other from harm. Phi Psi argued that under Scheffel's theory, the most it owed was a duty to fraternity members—not to Scheffel, a third party. The

Court agreed with Phi Psi. Scheffel attempted to raise a new theory on appeal, arguing that by undertaking a duty to prevent sexual assaults, Phi Psi undertook a duty to prevent sexual assault to potential victims, such as Scheffel. However, Court of Appeals rejected that argument because she did not make the argument before the trial court (i.e., she did not "preserve" the issue for appeal).

The Court of Appeals affirmed the trial court's ruling in favor of Phi Psi's motion for summary judgment and upheld Phi Psi's dismissal from the case.



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