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### Summary of Sparks v. Alpha Tau Omega, 127 Nev. Adv. Op. No. 23

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*Nevada Law Journal*

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*Sparks v. Alpha Tau Omega*, 127 Nev. Adv. Op. No. 23 (May 26, 2011)<sup>1</sup>  
CIVIL PROCEDURE-Reasonable Diligence and Fictional Defendants  
TORTS-Liability for Third Party's Actions

**Summary**

Appeal from two district court orders granting summary judgment in favor of multiple defendants in a tort action.

**Disposition/Outcome**

The Supreme Court of Nevada affirmed both of the district court's grants of summary judgment.

**Factual and Procedural History**

In October 2002, appellants Roy and Andrea Sparks ("Sparkses") attended a tailgate gathering for a football game between the University of Nevada, Las Vegas (UNLV) and the University of Nevada, Reno (UNR). During the tailgate, Roy Sparks and Jeffrey Clack ("Clack") got into a fight, which resulted in Clack biting off a piece of Roy's nose. Clack was attending a separate tailgate gathering across from the Sparkses put on by the UNR Alumni Association and the Southern Nevada Young Alumni Association (SNYAC). Members of both the UNLV and UNR chapters of Alpha Tau Omega (ATO) were also at the Alumni gathering.

In February 2004, the Sparkses filed suit against Clack, the national ATO association, the local UNLV and UNR ATO chapters, and other university entities, along with fictitious Roe and Doe defendants, for negligence and numerous intentional torts. During discovery, the Sparkses learned the Alumni organizations involvement in the tailgate. In 2006, the Sparkses were granted a motion to amend their complaint to include the Alumni defendants. Eight months later the Sparkses filed an amended complaint naming the Alumni defendants.

The Alumni defendants filed a motion to dismiss or in the alternative for summary judgment. The district court granted the Alumni defendants' summary judgment because the Sparkses failed to exercise reasonable diligence to ascertain the unknown defendants and promptly amend the pleadings. Therefore, the statute of limitation barred the Sparkses claims because they failed to prove the required elements for the amendment to relate back. The ATO defendants also filed a motion for summary judgment, arguing they owed no duty of care to the Sparkses, which the district court granted.

**Discussion**

Justice Hardesty, writing for the Court, held summary judgment was proper for the Alumni respondents because the Sparkses did not exercise reasonable diligence to ascertain the

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<sup>1</sup> By Cristen Thayer.

identity of unknown defendants. Furthermore, the ATO respondents were not liable because they did not owe a duty of care to the Sparkses and also did not control or ratify Clack's behavior.

### **The District Court Did Not Err in Granting the Alumni Respondents Summary Judgment**

In granting the Alumni respondents motion to dismiss or in the alternative for summary judgment, the district court considered documents outside the motion, therefore the court treated the order as an order for summary judgment, which is reviewed de novo.

#### *Reasonable Diligence*

Nev. R. Civ. Pro. 10(a) allows a party to replace a Doe or Roe defendant with a named party when the true identity is discovered. In addition, the amendment can relate back to the date of the filing of the original complaint when the plaintiff can prove compliance with the *Nurenberger* test.<sup>2</sup> Under *Nurenberger*, the plaintiff must (1) plead fictitious or doe defendants in the caption of the complaint, (2) plead the basis for naming the defendants by other than their true identity, and (3) exercise reasonable diligence to ascertain the true identity of the intended defendants and promptly move to amend the complaint to substitute the actual for the fictional. The district court found the Sparkses failed the third prong and therefore the amendment adding the Alumni respondents did not relate back.

The requirement of reasonable diligence is intended to guard against abuse of using Doe defendants as placeholders to circumvent the statute of limitations. However, the Court had not yet defined what reasonable diligence is in the context of relating back an amendment. The Court instructed the district courts to look to other jurisdictions that have established factors that show reasonable diligence. These factors include, but are not limited to: (1) whether the party unreasonably delayed amending the pleading to reflect the true identity of a defendant once it became known,<sup>3</sup> or (2) used judicial mechanisms such as discovery to ascertain the identity of the unknown defendant<sup>4</sup>, or (3) whether the defendant somehow obstructed the plaintiff's inquiry.<sup>5</sup>

Here, the Sparkses were not reasonably diligent. One year and seven months after filing the joint case conference report, the Sparkses discovered the Alumni respondents were involved in the tailgate. At that point they did file a motion to amend, but then waited almost eight months after the district court granted the motion to file the amended complaint. The Sparkses only defense for this delay was a complex set of facts and witnesses who claimed memory loss frustrated discovery. However, the Court rejected this defense as it did not explain the eight month delay in filing the amended complaint after receiving authorization. Additionally, the Sparkses took only two depositions between discovery commencement and filing the motion to amend, and there is no evidence the defendants obstructed the investigation. Thus, the district court correctly found the Sparkses failed to exercise reasonable diligence in ascertaining the

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<sup>2</sup> *Nurenberger Hercules-Werke GMBH v. Virotek*, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991).

<sup>3</sup> *Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999).

<sup>4</sup> *Price v. Clark*, 21 So. 3d 509, 526 (Miss. 2009).

<sup>5</sup> *Fazzalare v. Desa Industries Inc.*, 351 N.W.2d 886, 893 (Mich. Ct. App. 1984) (Beasley, J., dissenting).

identity of the Alumni respondents, and properly granted summary judgment in favor of the Alumni respondents.

### **The District Court Did Not Err in Granting the ATO Respondents Summary Judgment**

Whether a defendant owed a plaintiff a duty of care is a question of law, and here, neither ATO national or local ATO chapters owed the Sparkses a duty of care.

#### *Special Relationship and the Duty of Care*

Generally, in negligence claims a party has no duty to control the dangerous conduct of another. However, when a special relationship exists between the parties, and the harm created by the defendant's conduct is foreseeable, this general rule does not apply.<sup>6</sup> Control is required to establish a special relationship between the national and local fraternity chapters and third parties, because when one party submits to the control of another, the controlling party must protect the controlled party from reasonably foreseeable threats based on the dominant submissive relationship.<sup>7</sup> The control must be real, and if exercised, would meaningfully reduce the risk of harm that actually occurred.<sup>8</sup> The Court next analyzed the national and local chapters separately.

#### *Relationship Between ATO National and the Sparkses*

ATO national must have had a duty to monitor or control its local chapters to be held liable. Although the Court never addressed this issue, it found the Pennsylvania Supreme Court's take on the matter instructive.<sup>9</sup> In *Alumni Ass'n v. Sullivan*, a college student consumed alcohol at a party hosted by his dormitory and a fraternity, of which he was not a member. The student then allegedly set a fire at a neighboring fraternity. The neighboring fraternity sued both the student for setting the fire, and the first fraternity for negligently providing the student with alcohol. The court found the national organization did not have a duty to monitor the everyday activities of its local chapters because the national organization did not have the resources to monitor the actions of the chapter contemporaneously with the event.<sup>10</sup> Here, the Sparkses failed to present evidence why ATO national should be liable for an event over which it had no control or supervision. Therefore, ATO national owed no duty of care to the Sparkses because no special relationship existed.

#### *Relationship Between ATO-UNR and ATO-UNLV and the Sparkses*

Similarly, the local chapters owed a duty of care to the Sparkses only if they had a special relationship with either Clack or the Sparkses, which was dependent on the existence of actual control. The Sparkses argued the relationship that gave rise to control was that akin to that of a

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<sup>6</sup> *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. \_\_\_, \_\_\_, 221 P.3d 1276, 1280 (2009).

<sup>7</sup> *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 969, 921 P.2d 928, 930 (1996).

<sup>8</sup> *Grand Aerie Fraternal Order v. Carneyhan*, 169 S.W.3d 849, 851 (Ky. 2005).

<sup>9</sup> *Alumni Ass'n v. Sullivan*, 572 A.2d 1209, 1209-10 (Pa. 1990).

<sup>10</sup> *See also Carneyhan*, 169 S.W.3d at 854; *Colangelo v. Tau Kappa Epsilon Fraternity*, 518 N.W.2d 289, 292 (Mich. Ct. App. 1994).

landowner-invitee. The Court rejected this argument however, because the Sparkses were not invitees of the local chapters. Furthermore, even assuming Clack was an invitee, the incident occurred in an area not controlled by the chapters, therefore neither chapter owed a duty of care to the Sparkses.

### *Liability for Intentional Torts*

Finally, the Sparkses argued the ATO respondents were liable for Clack's intentional torts because they ratified his actions. An association is not responsible for the tortious acts of a person not subject to its control. Furthermore, even if the tortious wrongdoer is a member, the organization is not liable unless it authorizes or ratifies the conduct. Since Clack was not under control of or a member of ATO, the organization is not liable for his intentional torts.

In a similar matter, the Alabama Supreme Court held a fraternity not liable for the conduct of its members when they fought on another fraternity's property because the fraternity did not encourage, authorize, or subsequently ratify the behavior.<sup>11</sup> Further, the fraternity's failure to punish the tortious members was not evidence of ratification. Here, the Sparkses argued the ATO respondents ratified Clack's behavior when the ATO-UNR officers suffered memory loss while giving statements to the police. However, an ATO-UNR officer called the police shortly after the incident with Clack's name. Additionally, the fight was too short for the respondents to ratify the behavior during the incident. For these reasons, the Court rejected this argument and found the ATO respondents not liable for Clack's intentional torts because they did not control him or ratify his actions.

### **Conclusion**

The Sparkses failed to exercise reasonable diligence in ascertaining the identity of unknown defendants and subsequently amending the complaint to include the unknown defendants. Therefore, the amendment did not relate back and the statute of limitation barred the Sparkses claims against the Alumni respondents. Furthermore, neither the national or local chapters had a special relationship with the Sparkses or Clack and therefore owed no duty of care to the Sparkses. Finally, because the ATO respondents had no control of Clack and did not ratify his actions, they were not liable for his intentional torts. Thus, the Court affirmed the grant of summary judgment for both the Alumni and ATO respondents.

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<sup>11</sup> Rothman v. Gamma Alpha, 599 So. 2d. 9, 10-11 (Ala. 1992).