

FILED
Apr 04, 2016
Court of Appeals
Division III
State of Washington

No. 33776-6-III

COURT OF APPEALS,
DIVISION THREE
OF THE STATE OF WASHINGTON

Domenic R. Rockey, *Appellant*

v.

Washington State University, *Respondent*.

REPLY BRIEF OF APPELLANT

Joseph O. Baker
Attorney for Appellant

Law Offices of Gehrke, Baker, Doull
& Kelly, PLLC
22030 7th Ave S, Suite 202
Des Moines, WA 98198
Tel: (206) 878-4100
Fax: (206) 878-4101
WSBA No. 32203

TABLE OF CONTENTS

I.	ARGUMENT IN REPLY	4
	1. Reasonable minds could differ on whether the assault of Rockey in the locker room was foreseeable.	4
	2. WSU is not entitled to costs and fees on appeal.	9
II.	CONCLUSION	11

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>Borden v. City of Olympia</i> , 113 Wn. App. 359, 369 (2002)	9
<i>Herrington v. Hawthorne</i> , 111 Wn. App. 824 (2002)	4
<i>McKown v. Simon Prop. Grp., Inc.</i> , 182 Wn.2d 752 (2015)	6, 7
<i>Satterlee v. Snohomish Cty.</i> , 115 Wn. App. 229, 237 (2002)	10

I. ARGUMENT IN REPLY

1. Reasonable minds could differ on whether the assault of Rockey in the locker room was foreseeable

In its response brief, WSU argues that although an unidentified player attempted to initiate a physical confrontation with Rockey after he (apparently) continued to give poor effort on the up-downs,¹ the jury must speculate “that the student-athlete intended to physically assault Rockey, rather than speak to him or engage in some other non-assaultive behavior.” *See Br. of Resp.* at 12. Disregarding the rule on summary judgment that all facts and reasonable inferences are construed in a light most favorable to the non-moving party,² WSU argues that Rockey’s “interpretation of the evidence is both unsupported by the record, which establishes comprehensive prohibitions against such behavior maintained by the University, the athletic department and the football team, and irrelevant to summary judgment.” *See id.* WSU’s argument is both incorrect and disregards testimony already on the subject.

According to Head Strength and Conditioning Coach Jason

¹ Recall that on October 1, 2013, Domenic Rockey, a walk-on quarterback of the Washington State University (WSU) football team, was assaulted by a scholarship player, Emmitt Su’a-Kalio, in the football team’s locker room. The assault of Rockey stemmed from a morning workout session which was cut short by Head Strength and Conditioning Coach Jason Loscalzo. *See CP* at 277-278.

² *See Herrington v. Hawthorne*, 111 Wn. App. 824, 829 (2002).

Loscalzo (who cut short the October 1, 2013 morning workout session, demanding that the players come “ready to lift”), an unidentified player attempted to initiate a physical confrontation with Rockey after he allegedly continued to give poor effort on the up-downs:

He wouldn't leave the weight room. *An individual in the group – I don't know who it was – went to go physically confront him*, and one of my staff members was there and kept that from happening. Rockey then left the room. And we continued the workout.

See CP at 277-278 (emphasis added).

Despite WSU's arguments to the contrary that the athlete merely intended to speak to Rockey or “engage in some other non-assaultive behavior” (which it is certainly free to make to the jury), the reasonable inference from this testimony *is* that the player intended to physically assault him for his perceived lack of effort during the workout.

Indeed, Coach Loscalzo admitted that the player “*went to go physically confront [Rockey]*, and one of my staff members was there and kept that from happening.” *See CP at 277-278 (emphasis added).* In this regard, WSU's citation to “comprehensive prohibitions against [assaultive] behavior maintained by the University, the athletic department and the football team” is red a herring. The Revised Code of Washington also includes prohibitions against assault. *See, generally*, chapter 9A.36 RCW. However, this is not the point.

WSU freely admits that it owed Rockey a duty of care as a business invitee. *See* Br. of Resp. at 9. And while WSU acknowledges that “Washington courts have held that a business owes a duty to its invitees to protect them from ‘reasonably foreseeable’ criminal acts of third persons[,]” it argues that the “[u]nder the facts in this case, there is no evidence that Su'a-Kalio's assault upon Rockey was reasonably foreseeable.” *See* Br. of Resp. at 9-10. In so doing, WSU’s brief purports to discuss *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 757 (2015), but omits a central underpinning of the case.

The *McKown* court specifically stated in its conclusion the following:

In answer to the Ninth Circuit's second inquiry, ***proving acts of similar violence is not the only way for a Plaintiff to establish a duty as provided in the Restatement.*** However, it is the one we focus on here because prior history of violence is really the only basis for liability that the parties meaningfully address and the only one that the Ninth Circuit has asked us to clarify.

See McKown, 182 Wn.2d at 774 (emphasis added).

More relevant to this case, Rockey did not rely on evidence of prior bad acts, but rather, generally, comment f of the restatement:

Since the possessor is not an insurer of the visitor's safety, ***he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur.*** If the place or character of his business, or his past experience, is

such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, *and to provide a reasonably sufficient number of servants to afford a reasonable protection.*

...

Thus, comment f, like section 344 itself, contemplates two kinds of situations that may give rise to a duty—*the first is where the landowner knows or has reason to know of immediate or imminent harm*, and the second is where the possessor of land knows, or has reason to know, based on the landowner's past experience, the place of the business, or the character of the business, there is a likelihood that harmful conduct of third parties will occur on his premises.

See McKown, 182 Wn.2d at 768 (emphasis added).

While Su'a-Kalio's assault upon Rockey in the locker room afterwards was unprovoked, it was not unforeseeable. Indeed, a reasonable juror could very easily determine that it was foreseeable, *e.g.*, based upon the prior "physical confrontation" testified to by Coach Loscalzo:

[Rockey] wouldn't leave the weight room. *An individual in the group – I don't know who it was – went to go physically confront him, and one of my staff members was there and kept that from happening.* Rockey then left the room. And we continued the workout.

See CP at 277-278 (emphasis added).

Indeed, Coach Loscalzo testified that one of his staff members "kept that [physical confrontation] from happening." If a physical assault was not imminent, then why did one of Coach Loscalzo's own staff

members feel it necessary to intervene? After all, there are “comprehensive prohibitions against [assaultive] behavior maintained by the University, the athletic department and the football team[.]” Wouldn’t these prohibitions (and/or RCW 9A.36.041) be sufficient to guard against an imminent threat of physical harm to Rockey in the weight room (or the locker room?) The answer to this question is obviously “no” due to the intervention of the staff member.

Taking the evidence and inferences therefrom in the light most favorable to Rockey, the attempted assault in the weight room alone—even without the directive from coaches to “hold each other accountable”³—put coaches and other staff members on notice that Rockey was in danger of physical harm wherever he went in the football

³ The trial court summarized this evidence on the record as follows:

You have, again, construing the evidence most favorably to the Plaintiff, a policy, football coaches, football team, where players are to hold each other accountable. There’s evidence in the record here that the coaches themselves engage in physical punishment when they feel the team or players aren’t doing what they should be doing. Evidence that they make all of the players, punish them if one player falls down or doesn’t do what that player’s supposed to do. You’ve got evidence that the Plaintiff perhaps wasn’t working hard enough, wasn’t doing what he was supposed to do at the practice, and evidence that other players, including the player in question here ... felt that the Plaintiff wasn’t doing what he was supposed to do. (*See* RP at 21.)

building – at least with respect to the players in Rockey’s weight-lifting group who were punished for his perceived lack of effort. Moreover, since a WSU football staff member intervened and prevented a physical confrontation from occurring between a player and Rockey in the weight room, he or she would also have a corresponding duty to follow through to ensure a similar confrontation did not occur elsewhere.⁴

The undisputed facts do not entitle WSU to judgment as a matter of law as reasonable minds could differ on whether the assault of Rockey in the locker room was foreseeable. And therefore, Rockey is entitled to a trial on this issue.

2. **WSU is not entitled to costs and fees on appeal**

Citing only RAP 18.1 and 18.9, WSU makes a cursory, one-sentence request for attorney’s fees and costs on appeal. *See* Br. of Resp. at 22. Presumably, WSU’s request is based upon an argument that Rockey’s appeal is frivolous. WSU’s argument is without merit.

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

⁴ *See, e.g., Borden v. City of Olympia*, 113 Wn. App. 359, 369 (2002) (“As a general rule, one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance.”)

[is] no reasonable possibility of reversal." *See Satterlee v. Snohomish Cty.*, 115 Wn. App. 229, 237 (2002).

Here, the standard of review for summary judgment orders is *de novo* as opposed to abuse of discretion. The trial court, while granting WSU's motion for summary judgment, termed the issues in this case "interesting" on multiple occasions and even contemplated that it may be reversed on appeal. *See* RP at 20-23. To be sure, "[i]n determining whether an appeal is frivolous, the court considers, in addition to the foregoing definition of 'frivolous appeal,' the following principles: [1] RAP 2.2 gives a civil appellant the right to appeal, [2] all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, [3] the record should be considered as a whole, and [4] an appeal that is affirmed simply because the court rejects the arguments is not frivolous." *See Satterlee*, 115 Wn. App. at 237-38 (brackets added).

This case, this appeal and the issues raised within them are not frivolous. Rather, they are important issues to Mr. Rockey and to college sports in general. And other than its very brief reference to the rules of appellate procedure, WSU makes no serious attempt to classify this appeal as frivolous. The reason for this is simple: this appeal is not frivolous.

As such, This Court should reject WSU's request for attorney's fees and costs on appeal.

II. CONCLUSION

For all the foregoing reasons and reasons set forth in his opening brief, the appellant, Domenic Rockey, respectfully requests that this Court reverse the trial court's decision granting Defendant's motion for summary judgment and remand this case for trial.

Dated this 4th day of April, 2016.

LAW OFFICES OF GEHRKE, BAKER, DOULL &
KELLY, PLLC

By



Joseph O. Baker, WSBA #32203
Attorneys for Appellant
Law Offices of Gehrke, Baker, Doull &
Kelly, PLLC
22030 7th Ave S, Suite
Des Moines, WA 98198
Tel. 206.878.4100
Fax 206.878.4101

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing REPLY BRIEF OF APPELLANT on the following individuals specified below on 4/4/16.
Service was made by electronic filing and service.

Paul J. Triesch
Attorney General's Office
800 5th Ave Ste 2000
Seattle, WA 98104-3188



Joseph O. Baker, WSBA #32203