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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*.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the defendant's motion for summary judgment on Rockey's claim of negligence.
2. The trial court erred in granting the defendant's motion for summary judgment on Rockey's claim of *respondeat superior*.

Issues Pertaining to Assignments of Error

1. Whether genuine issues of material fact exist on Rockey's claim that defendant breached its duty of care owing to him.
2. Whether defendant is entitled to judgment as a matter of law on Rockey's claim of negligence under the undisputed facts of the case.
3. Whether genuine issues of material fact exist on Rockey's claim of *respondeat superior*.
4. Whether defendant is entitled to judgment as a matter of law on Rockey's claim of *respondeat superior* under the undisputed facts of the case.

II. STATEMENT OF CASE

This is an appeal from an order granting summary judgment entered on August 31, 2015 in Whitman County Superior Court. CP at 373-374.

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:

We had an individual late. The group began doing their up-downs for the individual that was late. Domenic Rockey was giving poor effort. We began the up-downs again because he was giving poor effort. He continued to give poor effort on the up-downs. So, we stopped the group, and I told him ... "If you are not going to take this seriously, then you need to leave."

And he started to laugh or smile, from I perceived as laughter. He's – that's when I kicked him out, told him he needs to leave.

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.

According to Loscalzo, "[t]he entire group was giving poor effort, poor attitude[,] so [they] ended up ending the workout about ... 15

minutes or so after that incident took place.” *See* CP at 281. Loscalzo told the rest of the group “they needed to come ready to lift. Have some energy. Make sure they are coming in enthusiastic, ready to work out.”

See id.

Su-a-Kalio, himself, testified as follows regarding the incident:

So Tuesday, October 1st we had a workout at 6:00 in the morning. Everyone was waiting in the lifting room. We found out that one walk-on player was coming late. So I told the group that let’s knock out up-downs and just get over it and focus on the workout. That’s what happened. So we did our up-down. And Coach Loscalzo, he saw Rocky, he was struggling with his up-down, so he got mad and made us start again.

So when we restart, I saw him leave the room, I saw him laughing and [inaudible] because everyone was there to work hard, you know. And after that, after up-downs coach talked to us and he just was so mad because was also way of getting better. So I was [inaudible] was Rocky because he got me mad. I went into the locker room. I saw him when he came out of the bathroom. I just sucker punch him and walked outside.

See CP at 305-306; *see also* CP at 310.

Su’a-Kalio was recruited to WSU from American Samoa by Defensive Line Coach Joe Salave’a. *See* CP at 198. Coach Salave’a testified in his declaration in support of Defendant’s motion for summary judgment that “[t]here was no evidence or information that suggested he had anger issues or that he would ever assault anyone.” *See* CP at 199. However, before the University Conduct Board, Coach Salave’a testified,

in response to a question as to how he would describe Su'a-Kalio's behavior or attitude as follows: "I can honestly say that, you know, he's an emotional kid[.]" *See* CP at 299.

When asked about what steps the football program had taken "to assure Domenic [Rockey] that [the assault] was not his fault and that should not happen again and that would never happen again? And to also make it very clear to the team that that was absolutely not okay[.]" Coach Salave'a testified as follows: "You know, I can't really answer that. You have to refer that to Emerick ... because some of those, the legal standpoint of being accountable to Rockey[.] ..." *See* CP at 301.

Of particular interest to one University Conduct Board member, Faculty Chair Carmen Lugo-Lugo, was the fact that "there were 30 kids in that [locker] room and only one of them went to help ... Domenic [Rockey] when that happened." *See* CP at 303-304. To her, "that signal[ed] that there's something profoundly ... kind of array [sic] there, and just weird[.]" *See* CP at 304.

Coach Salave'a testified in his deposition that the concept of accountability is an "everyday conversation with our guys." *See* CP at 315. He further testified that players are expected to hold each other accountable. *See id.* Indeed, the directive to "hold each other accountable" was "emphasized" to the football team, including Su'a-

Kalio, at the first team meeting in 2013. *See* CP at 31-32; *see also* CP at 36.

Prior to the University Conduct Board hearing on November 13, 2013, a staff meeting was held to determine what discipline Su'a-Kalio was going to receive for the incident. *See* CP at 326-327. This meeting included the one person with the final say over what discipline was to be imposed, Head Coach Mike Leach. *See* CP at 327. Notes are not typically taken at staff meetings. *See* CP at 327.

In his November 7, 2013 letter to University Conduct Board Chair in support of Su'a-Kalio, Head Football Coach Mike Leach wrote the following:

...
Emmitt is a freshman student-athlete from American Samoa and at the time of the incident he had only been in the United States for a few months. There is an obvious communication barrier that exists and although Emmitt is making great strides with English, it is his second language. There are occasions of misinterpretation that can take place and when our coaches constantly preach to "***keep each other accountable***," Emmitt took this literally.
...

See CP at 337 (Emphasis added).

Su'a-Kalio's football scholarship was not renewed for the 2014-2015 season due to the ruling of the University Conduct Board. *See* CP at 335.

Rockey's complaint alleged that WSU was liable for his special and general damages resulting from the Su'a-Kalio's assault under the theories of negligence and *respondeat superior*. See CP at 120-121. Defendant moved for summary judgment, arguing that (1) it did not owe Rockey a special duty of care, (2) it does not have liability under *respondeat superior*, (3) it did not breach its duty to Rockey as a business invitee, and (4) Su'a-Kalio's criminal assault was not foreseeable as a matter of law. See, generally, CP at 2-16.

The trial court granted Defendant's motion, ruling as follows:

All right. Well, got some interesting issues here. However, I feel Plaintiff is clearly plowing new ground here on the landlord liability theory of the case here. Construing all of the evidence most favorably to the Plaintiff, you have a—well, two football players, the same team. One sucker-punches another, and that's the action that forms the basis of this cause of action. 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—I'm not going to try to pronounce his name—felt that the Plaintiff wasn't doing what he was supposed to do. And there's some evidence here that there was a confrontation between another player and the Plaintiff shortly before this assault occurred. I believe that also occurred in the locker

room here.

But, even taking all of those facts into account here, I do not feel as a matter of law here that a reasonable juror could conclude that this sudden assault, sucker-punch by one player against the Plaintiff, could be foreseeable. So, I'm going to dismiss the cause of action that's based on landlord liability assuming that's a viable theory in the case. It doesn't seem to be contested that the Plaintiff was a business invitee.

Likewise, it would be new law and—for the Court to allow the Plaintiff here to proceed on a theory of respondeat superior. You have a scholarship—scholarship athletes here. And there's no Washington cases that have been cited that seem to be conceded here that hold that the scholarship athlete, a scholarship student, is an employee of the University despite the fact that obviously the coaches and the University have control—substantial control over that person. And there's scholarships and there are stipends, and there is some compensation here. But, even so, there's no law and other jurisdiction of the law seems to be contrary to the Plaintiff's argument here that under these circumstances there would be an employer/employee [sic] relationship.

But, even if I were to find otherwise, there's no evidence that would support a finding by the Court here that the assault that we're dealing with here, which is a criminal assault, which is in violation of University rules and violations of team rules and in violation of Athletic Department policies here, would be within the scope of employment or within the scope of the rule that a player is expected to exercise. There's evidence that the coaches have a policy, a rule, we'll say, understanding with the players that they're to hold one another accountable. But, even so, there's nothing in the record here, I feel, that could permit a jury based on that policy here of accountability that would support a finding that that involved requiring or allowing or expecting players to physically discipline other players. So, again, I don't feel that there's sufficient evidence in the record to support a finding of an

employee/employer relationship or that what occurred here that—that brought about this cause of action here, this assault, would be within the scope of a player or employees—football players’ employment, if that’s a term.

So, again, I feel you’re—interesting issue. I believe you’re plowing new ground. And maybe an appellate court would disagree with me. They usually do, but. So, I’ll grant the motion, which, in effect, this is the action.

See RP at 20-23.

This timely appeal followed the trial court’s entry of the order granting Defendant’s motion for summary judgment. See CP at 377-381.

III. ARGUMENT

1. Standard of Review.

This Court engages in the same inquiry as the trial court on review of summary judgment. *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 962-63 (1997). The facts and inferences therefrom are viewed in the light most favorable to the nonmoving party, and summary judgment may be granted when there are no material issues of disputed fact and the moving party is entitled to judgment as a matter of law. *See id.*; *see also* CR 56(c).

“The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.” *See Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 144 (1972); *see also Babcock v.*

State, 116 Wn.2d 596, 599 (1991) ("Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial."). To that end, "[t]he motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." See *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982).

2. **The trial court erred in determining that WSU was not liable for Su'a-Kalio's assault under a respondeat superior theory.**

- a. *Su'a-Kalio was an employee of the university at the time of the assault.*

In its motion before the trial court, WSU relied heavily upon a 2003 Massachusetts decision, *Kavanagh v. Trustees of Boston University*, 795 N.E.2d 1170 (2003) and the four other out-of-state decisions cited within the opinion,¹ for the proposition that scholarship athletes are not "employees" of their respective schools. That is, WSU did not cite any controlling case law from any Washington court analyzing the issue, e.g., because it was and is a question of first impression.

The *Kavanagh* court appeared to be wrestling with itself analyzing the issue:

¹ These decision are as follows: (1) See *State Compensation Ins. Fund v. Industrial Comm'n of Colo.*, 135 Colo. 570 (1957); (2) *Rensing v. Indiana State Univ. Bd. Of Trustees*, 444 N.E.2d 1170 (Ind. 1983); (3) *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35 (1983); and (4) *Korellas v. Ohio St. Univ.*, 121 Ohio Misc. 2d 16 (Ct. Cl. 2002).

It is undeniable that a successful athletic program, particularly in popular sports like basketball, can garner substantial revenues for colleges and universities, both directly from the sporting activities themselves (e.g., gate receipts, sale of broadcasting rights) and indirectly from the attention those activities attract (e.g., increased alumni giving). ***In recent years, the enormity of the revenues at stake in collegiate sports has prompted some to recommend that colleges and universities be allowed to compensate student athletes for their "services" and thereby transform them into employees.*** See Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 Notre Dame L. Rev. 206 (1990); Whang, Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes, 2 Sports Law. J. 25, 36-38 (1995). [5] ***It is recognized, however, that the current relationship of a player to a school remains that of scholarship student, not employee.*** Goldman, *supra* at 251; Whang, *supra* at 37-38; Comment, Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury?, 6 Vill. Sports & Ent. L.J. 219, 226 (1999).

See Kavanagh, 440 Mass. at 200-01 (emphasis added).

The *Kavanagh* court specifically recognized that “scholarships may introduce some element of ‘payment’ in the relationship[;]” however, it relied upon the *Rensing* case for the proposition that scholarships are not wages. *See id.* at 199.

The issue in *Rensing* was whether an employer-employee relationship between Rensing—a scholarship football player at Indiana State University—and the university existed in order to bring him under Indiana’s worker’s compensation statute. The *Rensing* court relied heavily

upon “NCAA requirements designed to prohibit student-athletes from receiving pay for participation in their sport[.]” *See Rensing*, 444 N.E.2d at 1173. According to the court, Rensing’s scholarship benefits (free tuition, room, board, laboratory fees and a book allowance) were not considered to be “pay” by the university or by the NCAA because they did not affect Rensing’s or the university’s eligibility status under NCAA rules. *See id.* That is, because the NCAA said that athletic scholarship benefits were not pay, they were not pay. In other words, if universities played by the rules established by an organization in which held membership, their athletes would be “eligible” to compete against other “eligible” athletes of member institutions.

Judicial deference to the NCAA’s rules on “amateurism” stood for many years until finally the *O’Bannon*² decision in 2014 held that “the NCAA violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men’s basketball and FBS football players any more than the current association rules allow.” *See O’Bannon v. NCAA*, 7 F. Supp. 3d at 1009; *see also id.* at 999-1000 (noting that “Plaintiffs ... presented ample evidence here to show that the college sports industry has changed substantially in the thirty years since [*NCAA v.*

² *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part and reversed in part*, *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984)] was decided.”). Although the district court’s judgment was affirmed in part and reversed in part by the Ninth Circuit in 2015,³ the court was careful to explain that:

[W]e reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules. ***In this case, the NCAA’s rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.*** The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.

See O’Bannon, 802 F.3d at 1079 (emphasis added).

While the *O’Bannon* cases deal with NCAA rules on amateurism in the context of an antitrust challenge, the lesson to be taken from them here is that the central underpinning of the decisions cited by WSU in its motion (i.e. that scholarship athletes are not or must not be paid) has been severely weakened, if not decimated.

“Where ... a stipulated monthly amount is paid for a particular service rendered by one who is also a student, it cannot be said that the University is merely ‘assisting’ the student to obtain an education.” *See*

³ See note 2, *supra*.

University of Denver v. Nemeth, 127 Colo. 385, 389, 257 P.2d 423 (1953) (football player was awarded workers benefits where he was furnished room, board and a job as consideration for playing football); *see also Van Horn v. Industrial Acc. Comm.*, 219 Cal.App.2d 457, 28 Cal.Comp. 187, 33 Cal.Rptr. 169 (1963) (compensation awarded to a football player who received \$50 per month athletic scholarship and \$75 per month rent during the football season).

Here, there is ample evidence from which the issue of Su'a-Kalio's relationship to WSU should, at a minimum, be submitted to the jury.⁴ WSU's senior associate athletic director and chief of staff for football, Dave Emerick, testified under oath that scholarship players "get paid in essence." *See* CP at 329. Mr. Emerick further testified as follows with respect to scholarships:

Q. So, what do scholarship players receive in return for playing for the football team beyond -- *what encompasses a scholarship?*

A. Tuition, room and board, books, fees, *and they get a monthly stipend.*

Q. Do you know how much that stipend is?

A. I don't know the exact numbers. Freshmen who live in the dorms get less because they have a meal plan. Once you are older, you live off campus, you get more. And the freshmen also got their dorm paid for. The stipend covers rent for the older kids.

Q. *Who determines how much that stipend is?*

⁴ *See, e.g.*, WPI 50.11.01 (Distinguishing Between Agents and Independent Contractors).

- A. It is under the NCAA.*
- Q. So, the NCAA sets limits on what can be paid out for a scholarship?*
- A. Correct, as far as their stipend.* For example, a stipend for Stanford, living in Palo Alto is going to be larger than a stipend in Pullman, Washington.
- Q. So, was there a maximum amount that can be paid?*
- A. The NCAA dictates it.*

See CP at 330-331 (emphasis added).

In addition, Coach Loscalzo, in response to criticism he received for his discipline practices involving another player, wrote an email to Athletic Director Bill Moos and Dave Emerick (among others) in which suggested that tardy athletes be fined “money from their stipend checks to take the physical aspect out of the equation.” *See CP at 285, 290.* Although this system was never implemented, its mere mention speaks volumes as to the realities of modern-day, big-time college athletics. That is, the current relationship of a player to a school is no longer that of scholarship student (if it ever was); rather, it is employee.

- b. Su'a-Kalio's assault of Rockey was in furtherance of WSU's interest.*

The test for liability under a respondeat superior theory is “whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of

his employer; or, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest.*" See *Bratton v. Calkins*, 73 Wn. App. 492, 498 (1994) (emphasis added).

Citing *Blenheim vs. Dawson & Hall Ltd.*,⁵ WSU further argued in its motion that even if Su'a-Kalio was an employee, it cannot be held vicariously liable for Su'a-Kalio's intentional criminal act. See CP at 10.

In *Blenheim*, the victim of an assault and rape brought an action against two corporations alleging that a number of their employees held a Christmas party at a construction site. She further alleged that the employees paid her to dance at the party, and that after dancing and drinking she felt drugged and attempted to run from the site. She claimed she was struck, raped, and left unconscious, awaking with a broken arm. See *Blenheim*, 35 Wn. App. at 437. The court held that as a matter of law, e.g., on a question of fact normally reserved for the jury, the defendant corporations were not liable because the alleged conduct involved assault and rape and "was not within the scope of employment or in furtherance of the employers' business." See *Blenheim*, 35 Wn. App. at 440. *Blenheim* is factually distinguishable.

Here, the evidence and reasonable inferences from the evidence—when viewed in the light most favorable to Rockey—show that Su'a-

⁵ *Blenheim v. Dawson & Hall*, 35 Wn. App. 435 (1983).

Kalio's assault of Rockey was motivated by his desire to "hold him accountable," as instructed by his coaches. *See* CP at 337 ("There are occasions of misinterpretation that can take place and when our coaches constantly preach to "keep each other accountable," Emmitt took this literally."). That is, Su'a-Kalio did not sucker punch Rockey because he was dating his ex-girlfriend or because he owed him \$600. Rather, he sucker-punched Rockey because he perceived that Rockey was not giving full effort and because the work out was prematurely ended due to his lack of effort.

In sum, this assault was not done for personal reasons. It was done for the purpose of calling out a teammate for not giving full effort, something WSU players are instructed to do. As such, the assault was done in furtherance of WSU's interest and respondeat superior liability attaches. At a minimum, a material issue of fact exists on Rockey's claim of *respondeat superior*, precluding summary judgment on this issue.

As stated by the faculty chair of the University Conduct Board, the fact that "there were 30 kids in that [locker] room and only one of them went to help ... Domenic [Rockey] when that happened ... signals that there's something profoundly ... kind of array [sic] there, and just weird[.]" *See* CP at 303-304.

3. **WSU was not entitled to judgment as a matter of law on Plaintiff's negligence claim because reasonable minds could differ on whether the assault of Rockey was foreseeable**

With or without a finding that Su'a-Kalio was an employee of the university when he assaulted Rockey, this Court should nonetheless find that there are genuine issues of material fact precluding summary judgment on Rockey's claim of negligence.

In its motion, WSU conceded that Rockey was in the football team locker room on October 1, 2013 as a business invitee. *See* CP at 11. "A special relationship exists between a business and an invitee so that the general common-law rule that a person owes no duty to protect others from criminal acts of third persons does not apply[.]" *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203 (1997). In *Nivens*, the Washington Supreme Court expressly adopted the RESTATEMENT (SECOND) OF TORTS § 344, finding it "consistent with and a natural extension of Washington law [which] properly delimits the duty of the business to an invitee." *See Nivens*, 133 Wn.2d at 204. The RESTATEMENT § 344 indicates:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise

reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

See Nivens, 133 Wn.2d at 203-204.

Citing *McKown* and *Tortes*, WSU's motion focused almost solely on a "prior acts" analysis, arguing that "Rockey cannot show that the University had or should have had knowledge of a propensity for violence in Su'a-Kalio that should have prompted precautions." *See* CP at 16. WSU misunderstands the application of *Nivens* and *McKown* to this case.

In *McKown*, the court held that "***when a duty is premised on evidence of prior similar acts***, a landowner or possessor owes a duty to protect business invitees from third party criminal conduct when such conduct is foreseeable based on past experience of prior similar acts." *See McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 757 (2015) (emphasis added). WSU's motion incorrectly asserted that evidence of prior similar acts is necessary to prove up a breach of the duty of care owed to business invitees. Such is not 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).

Here, 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).

Here, while Su'a-Kalio's assault upon Rockey was unprovoked, a reasonable juror could nonetheless conclude that it was foreseeable. WSU, by and through its coaches, had ample reason to suspect that Su'a-Kalio would act in a violent manner after the workout was prematurely cut

short due to Rockey's perceived lack of effort. Indeed, according to Coach Loscalzo, another 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).

Again, taking the evidence and inferences therefrom in the light most favorable to Rockey, the near-confrontation above, coupled with the directive from coaches to "hold each other accountable," (discussed above) should have given coaches and other staff (interns, graduate assistants, etc.) every indication that Rockey was in danger of physical harm. Further, the conclusion that Su'a-Kalio was *encouraged* to call out Rockey after the work out is buttressed by the fact that "there were 30 kids in that [locker] room and *only one of them went to help ... Domenic [Rockey] when that happened.*" See CP at 303-304 (emphasis added).

In sum, 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 was foreseeable. And therefore, Rockey is entitled to a trial on this issue.

IV. CONCLUSION

For all the foregoing reasons, 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 5th day of February, 2016.

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KELLY, PLLC

By _____



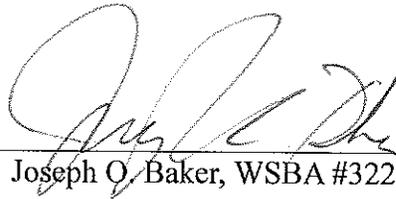
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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing BRIEF OF APPELLANT on the following individuals specified below on 2/5/16.

Service was made by U.S. Mail.

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



Joseph O. Baker, WSBA #32203