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Division III
State of Washington

NO. 33776-6

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DOMENIC R. ROCKEY,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Domenic Rockey appeals from an order granting Washington State University's motion for summary judgment, dismissing his negligence claim. Rockey is a student at the University, in Pullman. On October 1, 2013 a former University student and fellow member of the University's football team, Emmitwally Su'a-Kalio, intentionally struck Rockey in the face, injuring him. Su'a-Kalio pled guilty to fourth degree assault. Rockey sued the University in negligence, alleging the University is liable for Su'a-Kalio's intentional assault upon him.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. **Did The University Owe Rockey A Special Duty Of Care? (Assignment Of Error 1)**
- B. **Did The University Breach Its Duty As A Landowner? (Assignment Of Error 1)**
- C. **Is The University Liable Under *Respondeat Superior* For Su'a-Kalio's Intentional, Criminal Assault Upon Rockey? (Assignments Of Error 1 And 2)**

III. COUNTERSTATEMENT OF THE CASE

A. Standard Of Review

An appellate court reviews summary judgment orders *de novo*, undertaking the same inquiry as the trial court. *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 713-14, 248 P.3d 150 (2011). The court

considers the materials before the trial court and construes the facts and inferences in the light most favorable to the nonmoving party. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 988 P.2d 961 (1999).

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 721 P.2d 1 (1986). To survive dismissal, the nonmoving party cannot rely upon conclusory allegations, speculative statements, or argumentative assertions, but must produce independent evidence showing that a genuine material issue exists. CR 56(e). A lawsuit should be dismissed “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Where the record could not lead a rational trier of fact to find for the nonmoving party, there is no “genuine issue for trial.” *Id.* at 586-87.

B. Procedural Summary

Rockey sued the University in negligence, alleging the University is liable for Su’a-Kalio’s intentional criminal assault upon him. CP at 115-21. The University denied liability and moved for summary

judgment. CP at 226-51, 113-97, 201-19, 198-200, 220-25, 366-72; RP at 1-24. The trial court granted that motion. CP at 373-74. Rockey appeals.

C. Summary Of The Argument

There is no evidence that Su'a-Kalio presented a foreseeable risk of assaulting anyone. *Cf.* CP at 198-200. Su'a-Kalio intentionally struck Rockey, without warning. CP at 132, 142-43, 192-94, 196-97. Su'a-Kalio admits that he "did the wrong thing." CP at 306. He pled guilty to fourth degree assault. CP at 242-51.

As a matter of law, the University did not owe Rockey a special duty of care because of Rockey's status as a student. *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366 (1995) (citing *Bailey v. Forks*, 108 Wn.2d 262, 265, 737 P.2d 523 (1987)). Rockey alleges instead that the University owed him a duty of care as a landowner and/or under the doctrine of *respondeat superior*. CP at 115-21. However, Rockey presents no evidence that the University knew or should have known that Su'a-Kalio had any propensity for assaulting others, that his assault on Rockey furthered the interests of the University, and that Su'a-Kalio was the University's employee at the time of the assault. CP at 115-21, 253-66. There is no genuine issue of material fact regarding whether the University breached a duty of care to Rockey. CP at 113-97, 198-200, 201-19, 220-25.

D. Counterstatement Of The Facts

1. The University's Standards For Student Conduct

The University maintains and publishes clear standards and expectations for student conduct. CP at 201-19; <https://conduct.wsu.edu/>.¹ It also maintains an Office of Student Standards and Accountability through which it sets and administers those standards and expectations. *Id.*

The University's student conduct standards are enumerated in the Washington Administrative Code and in the University's Student Standards and Accountability Guidebook. *Id.*; WAC 504-26--Standards of Conduct for Students. Among the University's standards and expectations for student conduct are prohibitions against the physical abuse of others and against "engaging in conduct that creates an unreasonable risk of harm to another person or property." WAC 504-26-204 (abuse of others) and WAC 504-26-224 (reckless endangerment).

In addition to the standards, expectations, policies and procedures governing the conduct all students, the University imposes heightened standards and expectations upon student-athletes. CP at 201-19. And since November 30, 2011, the University's football team has operated under additional team expectations that are specific to the current head football coach, Mike Leach. CP at 220-25; 198-200. Among those

¹ Last referenced February 29, 2016.

expectations is a prohibition against doing anything that hurts the team, including fighting. CP at 220-25; 198-200. That prohibition and other internal team rules are communicated to the student-athletes at the first team meeting each season and they are restated throughout the season by Coach Leach and the team's position coaches. CP at 220-25; 198-200. Su'a-Kalio was present at the first football team meeting in fall 2013 and he was fully informed of the team rules. CP at 220-25; 198-200.

2. Rockey's Association With The Football Team

Rockey was a first-year undergraduate student at the University during the 2013-2014 academic year. CP at 116. He was also a "walk-on" member of the University's football team. CP at 116. Though Rockey was not recruited by the coaching staff and did not participate in fall camp, he was offered an opportunity to try out as a quarterback at the beginning of the school year. CP at 161, 163, 175-77, 180-83, 185-86. He did so. CP at 161, 163, 175-77, 180-83, 185-86.

3. Su'a-Kalio's Relationship With The University

Su'a-Kalio was recruited from American Samoa by the defensive line coach, Joe Salave'a. CP at 198-200. During Su'a-Kalio's recruitment, Salave'a visited with his high school counselor, football coach, teammates, and parents. CP at 198-200. Nothing suggested Su'a-Kalio might have anger issues or that he presented a foreseeable risk of

assaulting someone. CP at 198-200. To the contrary, Su'a-Kalio was highly recommended by everyone Salave'a spoke with. CP at 198-200. Between Su'a-Kalio's arrival in Pullman in summer 2013 and his assault on Rockey, there was no information to suggest that he presented a foreseeable risk of assaulting anyone. CP at 198-200.

4. Su'a-Kalio's Relationship With Rockey

Su'a-Kalio and Rockey were friends before and after the assault. CP at 137-39, 144-45, 152-53, 155-58, 160, 192-97. They attended classes together and walked to and from their dormitories together. CP at 137, 155, 158. They supported each other at football practice. CP at 138. Su'a-Kalio was the first football player to welcome Rockey to the team at Rockey's first practice. CP at 157. Rockey admits that Su'a-Kalio was always cordial and friendly toward him. CP at 157.

Rockey also admits he was surprised when he learned that Su'a-Kalio was the person who had assaulted him. CP at 156. He further admits that Su'a-Kalio's assault on him is the only instance he is aware of in which Su'a-Kalio engaged in any act of interpersonal violence toward anyone outside the game of football. CP at 155.

5. Su'a-Kalio's Intentional Assault On Rockey

On Tuesday, October 1, 2013, Rockey participated in an early morning workout with the football players who were not part of that

week's traveling team. CP at 126-34, 192-97. Another non-traveling player was late for the workout, so the strength coach, Jason Loscalzo, required all the players to do 75 "up downs." CP at 127-28, 57. Loscalzo felt that Rockey was not performing the "up downs" properly and he demanded that Rockey leave the workout. CP at 130.

Rockey returned to the football locker room. CP at 131. Minutes later, the remaining non-traveling players entered the locker room. CP at 131. Suddenly, without any warning, Su'a-Kalio "sucker punched" Rockey in the face, knocking him to the ground. CP at 132, 142-43, 58. Rockey speculates that Su'a-Kalio was angry because he perceived Rockey to have been laughing on his way out of the workout. CP at 57.

6. Su'a-Kalio's Criminal Charge, Plea And Conviction

Su'a-Kalio was immediately upset with himself; he knew that striking Rockey was "the wrong thing" and that he would be in trouble. CP at 306. Su'a-Kalio was punished by the football team and the University, and was criminally charged with assault in the fourth degree. CP at 198-200, 242-51. He pled guilty to that crime and a Judgment and Sentence was entered on his plea. CP at 242-51.

IV. ARGUMENT

To prove negligence, a plaintiff "must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4)

the breach as the proximate cause of the injury.” *Crowe v. Gaston*, 134 Wn.2d 509, 514-515, 951 P.2d 1118 (1998). It is well settled that the existence of a legal duty owed to a plaintiff is an essential element of a negligence action. *Petersen v. State*, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). The threshold determination of whether the defendant owed the plaintiff a duty is a question of law. *Terrell C. v. Department of Social and Health Services*, 120 Wn. App. 20, 84 P.3d 899 (2004); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749, 752 (1998).

A. The University Did Not Owe Rockey A Special Duty Of Care

In the State of Washington, no special duty of care is owed by a university toward its students. *Johnson*, 77 Wn. App. at 937 (citing *Bailey*, 108 Wn.2d at 265). Like many other states, Washington courts hold that the *in loco parentis* doctrine is inapplicable to college students. *Id.*; see also *Furek v. University of Delaware*, 594 A.2d 506, 516-19 (Del. 1991); *Nero v. Kansas State Univ.*, 253 Kan. 567, 861 P.2d 768, 773-78 (1993) (same). Governmental agencies are not liable for alleged breaches of a general duty of care owed to the public at large, and there is no duty to prevent a third party from intentionally harming another unless “a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct.” *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991).

B. The University Did Not Breach Its Duty As A Landowner

A duty can exist between a landowner and a person on the landowner's property. The highest of the three levels of such a duty is owed to an invitee, who may be either a business invitee or a public invitee. *Johnson*, 77 Wn. App. at 940. It is undisputed that as a student-athlete, Rockey was a business invitee at the time of Su'a-Kalio's assault.

Washington follows the *Restatement (Second) of Torts* § 343 (1965) regarding a landowner's duty of care to an invitee. *Curtis v. Lein*, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010). The duty owed is that of reasonable care with respect to the conditions of the premises which pose an unreasonable risk of harm. *Johnson*, 77 Wn. App. at 941. The courts have continued to recognize that the duty to protect invitees from criminal behavior is not a broad duty but a limited one, in recognition that it is often unfair to place the burden of third parties' criminal conduct on the landowner. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 766, 344 P.3d 661 (2015).

Generally, though "a possessor of land has no duty to all others under a generalized standard of reasonable care under all the circumstances," Washington courts have held that a business owes a duty to its invitees to protect them from "reasonably foreseeable" criminal acts of third persons. *McKown*, 182 Wn.2d 752; *Nivens v. 7-11 Hoagy's*

Corner, 133 Wn.2d 192, 943 P.2d 286 (1997). This duty has been distilled to protecting invitees from “imminent criminal harm and reasonably foreseeable criminal conduct by third persons.” *Nivens*, 133 Wn.2d at 293. No duty arises unless the harm to the invitee by third persons is foreseeable and Washington courts have been reluctant to find criminal conduct foreseeable. *Id.*; see *Jones v. Leon*, 3 Wn. App. 916, 926, 478 P.2d 778 (1970); *Shelby v. Keck*, 85 Wn.2d 911, 541 P.2d 365 (1975); *Christen v. Lee*, 113 Wn.2d 479, 496, 780 P.2d 1307 (1989).

In Washington, the concept of legal foreseeability is contained within the element of duty. *Mauch v. Kissling*, 56 Wn. App., 312, 318, 783 P.2d 601 (1989). “The harm sustained must be reasonably perceived as being within the general field of danger covered by the duty owed.” *Id.*

Thus, even if a special relationship existed between Rockey and the University that created a legal duty on the part of the University, any such duty would extend only to acts that are reasonably foreseeable. *Christen*, 113 Wn.2d at 492. Under the facts in this case, there is no evidence that Su’a-Kalio’s assault upon Rockey was reasonably foreseeable, a fact that Rockey readily admits. CP at 137-39, 144-45, 152-53, 155-58, 160, 191-97.

The Washington Supreme Court recently reaffirmed “foreseeability as a question of whether a duty is owed is ultimately for

the court to decide.” *McKown*, 182 Wn.2d at 762. In *McKown*, an assailant dressed in a dark trench coat began shooting a firearm at customers in the Tacoma Mall. *McKown*, 182 Wn.2d at 757. One of the victims was the plaintiff, who claimed the mall owners failed to exercise reasonable care to protect him from “foreseeable criminal harm.” As in this case, the duty question in *McKown* turned on whether the criminal conduct was reasonably foreseeable. The *McKown* Court held:

. . . 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. The prior acts of violence on the business premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur.

McKown, 182 Wn.2d at 757. “Where no evidence is presented that defendant knew of the dangerous propensities of the individual responsible for the crime, and there is no history of such crimes occurring on the premises, courts have held that *criminal conduct unforeseeable as a matter of law.*” *Id.* (emphasis added).

Similarly, in *Tortes v. King County*, a passenger on a metro bus was injured when another passenger shot and killed the driver. *Tortes v. King County*, 119 Wn. App. 1, 6-8, 84 P.3d 252 (2003). The *Tortes* court held that the incident was unforeseeable as a matter of law, because there

was no evidence of prior similar crimes on other buses. *Id.*

Here, Rockey argues that because an unidentified student-athlete “went to go physically confront” him when he refused to leave the morning workout after Loscalzo discharged him, the jury can speculate that the student-athlete intended to physically assault Rockey, rather than speak to him or engage in some other non-assaultive behavior. *See e.g.* Br. Appellant at 24. But this 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.

The court may only consider admissible evidence. *King County Fire Protection Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Argumentative assertions and unsupported conclusory allegations are not evidence, and do not defeat summary judgment. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991); *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985), *cert. denied*, 486 U.S. 1022, 108 S. Ct. 1996, 10 L. Ed. 2d 227 (1988). Rockey’s landowner liability claim fails because Su’a-Kalio’s criminal assault upon him was not legally foreseeable. *See Christen*, 113 Wn.2d at 492.

It is instructive that where athletics are concerned, courts have

repeatedly held that coaches can only be held liable if the player who committed the act had a known propensity toward similar violence. *Kline v. OID Assocs., Inc.*, 80 Ohio App. 3d 393, 396, 609 N.E.2d 564, 565 (1992) (dismissing negligence claim where soccer player was kicked in the mouth because he did not present evidence that the defendants knew that the assaultive player “had a propensity for violence” or was “likely to intentionally cause injury”); *Brown v. Day*, 68 Ohio App.3d 447, 588 N.E.2d 973, 974 (1990). Where the player does not have a known propensity for violence, the college and coach are both entitled to dismissal as a matter of law. *Kavanagh v. Trustees of Boston University*, 440 Mass. 195, 204, 795 N.E.2d 1170 (2003).

In *Kavanagh*, Boston University hosted a men’s basketball game against Manhattan College, where plaintiff Kavanagh played. *Kavanagh*, 440 Mass. at 196. In the second half of the game, after a player was called for a foul following a contested rebound, shoving ensued between the players. Kavanagh tried to stop the scuffle and was punched in the nose by a Boston University player, breaking it. He sued, claiming Boston University was liable for the conduct of its athlete and that it was negligent because it “took no steps to prevent this act.” *Id.*

In a detailed opinion citing decisions from numerous jurisdictions, the *Kavanagh* court “reject[ed] the proposition that the doctrine of

respondeat superior renders schools liable for the acts of their students, and decline[d] to treat scholarship students differently from paying students for these purposes.” *Kavanagh*, 440 Mass. at 196. The court held that neither “the university nor its coach had any duty to protect the plaintiff from a harm that it could not have reasonably foreseen.”

Id. at 204. The *Kavanagh* court’s reasoning is instructive:

In a general sense, one can always foresee that, in the thrill of competition and the heat of battle inherent in a contact sport, any player might someday lose his or her temper and strike an opposing player. *If that possibility alone sufficed to make an assault on the field of play reasonably ‘foreseeable,’ schools and coaches would face liability every time they allowed their enthusiastic players to take the field against an opposing team.* For these purposes, foreseeability must mean something more than awareness of the ever-present possibility that an athlete may become overly excited and engage in physical contact beyond the precise boundaries of acceptably aggressive play. *Rather, a defendant would have to have specific information about a player suggesting a propensity to engage in violent conduct, or some warning that a player or players appeared headed toward such conduct as the game progressed.*

Id. at 203 (emphasis added) (citing *Brown*, 68 Ohio App. 3d at 449–50) (coach not liable for negligent supervision of player who kicked opposing player in absence of prior examples of violent behavior).

The *Kavanagh* court observed that “neither the university nor its coach had any reason to foresee that (the assailant) would engage in violent behavior,” as he had not done so before and he did not have a

“history suggestive of potential violence on or off the basketball court.” *Kavanagh*, 440 Mass. at 204. Therefore, the court concluded that neither the university nor the coach had any duty to protect the plaintiff from a harm that was not foreseeable. *Id.* The same analysis applies here. Rockey must prove that the University had knowledge that Su’a-Kalio had a propensity towards similar violent behavior. Even unsportsmanlike conduct is insufficient to prove a “propensity for violence.” *Brown*, 68 Ohio App. 3d at 449-50. He presents no such evidence.

In *Brown*, the Wilmington College soccer team played Tiffin University. During the final minutes of the game, a player for Tiffin University (Neil Day) knocked the plaintiff to the ground and then “kicked him in the mouth,” which fractured his jaw. *Brown*, 68 Ohio App. 3d at 447. The plaintiff sued Day for assault and battery and brought a negligence claim against Tiffin University and its soccer coach, claiming they failed to supervise, control, and prevent Day from injuring him. *Id.* at 448. The plaintiff alleged the University “knew of Neil Day’s propensity toward violence and nevertheless allowed him to play.” *Id.* at 449. In support of this argument, he submitted declarations from players containing their opinions detailing the Tiffin team’s aggressive style of play and Day’s reputation for poor sportsmanship. *Id.*

In affirming the trial court’s dismissal of the negligence claim

against the University and the coach, the *Brown* court noted “there was no evidence in the affidavits that in prior intercollegiate soccer matches, Day committed spontaneous, violent acts *similar to his outbursts in the Wilmington game.*” *Id.* (emphasis added). The court stated:

[The plaintiff] failed to present evidence showing that Tiffin University and [coach] Ian Day had prior knowledge of Neil Day’s propensity for violent outbursts. Mere allegations of unsportsmanlike conduct do not rise to the level of imputing knowledge to a coach or college of an athlete’s propensity towards violent behavior. Absent a showing of such knowledge by Tiffin and Ian Day, no genuine issue of material fact exists.

Brown, 68 Ohio App. 3d at 449-50.

Similarly, in *Baker v. Trinity Pawling School*, 21 A.D.3d 272, 800 N.Y.S.2d 10 (2005), the New York Supreme Court dismissed a basketball player’s claims because the opposing school and coach could not have reasonably foreseen the attack by their player. The plaintiff was punched in the eye and elbowed in the mouth during a high school basketball game and, at the post-game handshake, an opposing player threatened him. As the plaintiff was leaving, the opposing player “hit [him] from behind” and repeatedly struck him. *Id.* at 273. The plaintiff sued the opposing team’s high school. The *Baker* court stated the operative rule:

In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had *sufficiently specific*

knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated.

Id. at 274 (emphasis added) (quoting *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994)). The *Baker* court noted “there was no prior history of violent conduct or behavioral problems” so as to “have placed defendants on notice of the alleged conduct which caused plaintiff’s injuries”; neither was there any “violent history” between the players. *Id.* Accordingly, even where there had been an earlier punch to the eye and elbow to the mouth, the court held that the defendants “could not have reasonably foreseen the attack on plaintiff.” *Id.*

The same analysis applies here. For the reasons stated in *Kavanagh*, *Brown*, and *Baker*, the University did not have a duty to protect Rockey from a harm it could not reasonably have foreseen, and the University could not reasonably have foreseen Su’a-Kalio’s intentional assault upon Rockey, because there is absolutely no evidence that he had any history of or propensity for engaging in such behavior. Rockey supplies none. The University did not breach its duty as a landowner.

C. The University Is Not Liable Under *Respondeat Superior*

For the University to be answerable under *respondeat superior* for Su’a-Kalio’s criminal assault on Rockey, its relationship with him must be that of employer-employee and Su’a-Kalio’s assault must have been

committed within the scope of his employment and in furtherance of the University's interests. *Breedlove v. Stout*, 104 Wn. App. 67, 70, 14 P.3d 897 (2001) (quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 841 (1986)). There is no evidence that Su'a-Kalio was an employee of the University or that his intentional criminal assault on Rockey occurred in the scope of any purported employment with the University. To the contrary, Su'a-Kalio's misconduct directly violated the established and well-publicized standards for University students, student-athletes, and members of the football team.

1. Su'a-Kalio Was Not A University Employee

"A student's status as student does not, by itself, make the student an 'employee' or 'servant' of the school the student attends." *Kavanagh*, 440 Mass. 195. Students attend college to serve their own interests, not the college's interests. *Hanson v. Kynast*, 24 Ohio St.3d 171, 174, 494 N.E.2d 1091 (1986). No appellate court in the State of Washington has addressed the question of whether scholarship student-athletes are employees of their schools, but the weight of authority from other jurisdictions holds that they are not. *See e.g. State Compensation Ins. Fund v. Industrial Comm'n of Colo.*, 135 Colo. 570, 314 P.2d 288 (1957) (rejecting workers' compensation claim stemming from injury to student athlete, reasoning that student attending school under athletic scholarship

is not an “employee”); *Rensing v. Indiana State Univ. Bd. Of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983) (noting that NCAA rules prohibit payment to student athletes and that proceeds of athletic scholarships are not taxable as income); *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35, 336 N.W.2d 224 (1983) (same); *Korellas v. Ohio St. Univ.*, 121 Ohio Misc. 2d 16, 779 N.E.2d 1112 (2002) (scholarship athlete not an “employee” of university). Courts have also rejected the theory that college athletes are “agents” of their schools. *Hanson*, 24 Ohio St.3d at 174 (member of university lacrosse team not “agent” of university).

Rockey does not cite legal authority or evidence in the record that compels a different conclusion. Instead, he relies upon *O'Bannon v. National Collegiate Athletic Association*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), which is an inapposite district court decision construing the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. But *O'Bannon* merely states 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.” *O'Bannon*, 7 F. Supp. 3d at 1009. It does not support a legal conclusion that Su’a-Kalio was an employee of the University when he assaulted Rockey, nor does it identify admissible evidence to support such a conclusion. And even if Su’a-Kalio were an employee of the University

at the time he assaulted Rockey, there is no evidence that his intentional assault upon Rockey furthered the University's interests.

2. Su'a-Kalio's Intentional Criminal Assault Did Not Further The University's Interests

Under the doctrine of *respondeat superior*, an employer is vicariously liable only for injuries caused by the *negligence* of its employee, not the employee's intentional criminal acts. *Brown v. Labor Ready N.W., Inc.*, 113 Wn. App. 643, 646, 54 P.3d 166 (2002). Thus, even if Su'a-Kalio had been an employee of the University when he assaulted Rockey, the University cannot be held liable under *respondeat superior* for that assault. See *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 440, 667 P.2d 125 (1983). "In particular, where an employee commits an intentional criminal assault in order to effect a purpose of his own, the employer is not liable." *Blenheim*, 35 Wn. App. at 440 (citing *Kyreacos v. Smith*, 89 Wn.2d 425, 572 P.2d 723 (1977)); *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

Rockey fails to show how Su'a-Kalio's intentional assault upon him was consistent with the established standards for student conduct maintained by the University, the athletic department, or the football team. He also fails to show how that assault furthered the University's interests. The evidence in the record is to the contrary.

Su'a-Kalio's assault irrefutably violated the established student conduct standards of the University, the athletic department, and the football team. <https://conduct.wsu.edu/>; WAC 504-26; CP at 198-225.

Su'a-Kalio himself acknowledges this, stating:

I just sucker punched him and walked outside. I was sitting in the lobby thinking *I knew I was in trouble because I knew I did the wrong thing*. I should have told him—like, talked to him. So a couple of hours later I saw him in the training room and I went in and apologized to him. That's all.

CP at 306 (emphasis added).

Rockey argues that Su'a-Kalio's assault upon him was actually Su'a-Kalio's attempt to further the football team's mantra that the players must "hold each other accountable." But that mantra is directed toward the support and promotion of team unity and respect for and adherence to team rules. CP at 220-25, 315. In fact, Coach Leach directly refutes Rockey's theory in his letter to the Student Conduct Board, stating "we don't condone such behavior to take place." CP at 337.

Moreover, Rockey's theory is nonsensical, because it argues that Su'a-Kalio was furthering the interests of the University by acting in a manner expressly prohibited by the University. Following Rockey's reasoning, the University would be liable in *respondeat superior* if a professor assaulted a student if he "perceived (the student) was not giving full effort." *See e.g.* CP at 262. But neither a professor's criminal assault

on student for poor effort nor Su'a-Kalio's assault on Rockey for poor effort furthers the University's interests in any way.

Ultimately, Rockey's theory is simply argument, not an admissible material fact. *Atherton Condo Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (a material fact is one upon which the outcome of the litigation depends). "An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial." *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999); *see also* CR 56. Rockey supplies no admissible evidence proving that Su'a-Kalio presented a foreseeable risk of assaulting him, or anyone else. Dismissal is proper.

V. ATTORNEY FEES ON APPEAL

The College requests an award of attorney fees and costs on appeal, pursuant to RAP 18.1 and 18.9.

VI. CONCLUSION

The University cannot be liable in negligence for Su'a-Kalio's intentional criminal act, either as an employer under the doctrine of *respondeat superior* or as a landowner under the theory of premises liability. Based on the foregoing arguments and authorities, the University respectfully requests that this Court affirm the trial court's order granting

summary judgment and award the University its fees and costs on appeal.

RESPECTFULLY SUBMITTED this 4th day of March, 2016.

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A handwritten signature in black ink, appearing to read 'P. Triesch', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the preceding Brief of Respondent was filed via Washington Courts' Electronic Filing for the Court of Appeals (COA), to:

Court of Appeals, Division III

That a copy of the preceding Brief of Respondent was served by Electronic Mail and U.S. Mail on counsel for appellant at the address below:

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