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Court of Appeals
Division III
State of Washington
3/30/2020 2:44 PM

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CASE NO. 370518
WHITMAN CO. SUPERIOR COURT NO. 18-2-00055-38

ZAIRE WEBB, an individual,
Appellant/Plaintiff,

v.

WASHINGTON STATE UNIVERSITY, MICHAEL C. LEACH,
ANDREW LEHR, KAREN FISCHER, and KELLY MYOTT-BAKER,
all in their individual capacities only,

Cross-Appellants/Defendants,

Reply Brief of Appellant/Cross Respondent Zaire Webb

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A. INTRODUCTION

The disputed factual circumstances related to Mr. Webb's academic and athletic performance and the numerous disputed events that predate the athletic scholarship hearing are irrelevant to whether WSU provided Mr. Webb adequate due process. Mr. Webb's athletic and academic performance are also entirely irrelevant to whether Lehr, Fischer, and Myott-Baker are entitled to either quasi or qualified immunity under Washington and federal law.

Similarly, the Student Athlete Handbook (the "Handbook") is either an enforceable contract, or it is not. The legal conclusion as to whether the student handbook created a bilateral contract is not governed by Mr. Webb's academic performance, but rather whether WSU was contractually required to follow the procedures it provided to students when supplying student handbooks. In the event this Court determines WSU's handbook created a bilateral contract, WSU will have the ability to argue over the disputed factual history on remand and attempt to convince a jury that it was justified in cutting Mr. Webb. The disputed factual circumstances that led up to Mr. Leach's decision to terminate Mr. Webb from the team are only relevant to assist a trier of fact in determining whether Mr. Leach acted in the course and scope of his employment. Mr. Webb presented evidence that Mr. Leach's actions stemmed from his personal animosity toward Mr. Webb

and factual questions pertaining to the tortious interference claim should be construed in a light most favorable to Mr. Webb and weighed by a jury.

B. MR. WEBB'S REPOSE TO CROSS-APPEAL

Cross-Appellants presented two assignments of error:

- 1) "The trial court erred finding Lehr, Fischer, and Myott-Baker violated Webb's due process rights." and
- 2) "The trial court erred finding Lehr, Fisher, and Myott-Baker were not entitled to qualified immunity."

The record demonstrates the trial court applied the correct due process standards as set forth in *Conard v. Univ. of Wash.*, 62 Wn. App. 664, 672, 814 P.2d 1242, 1247 (1991) and federal law. The undisputed facts establish that Mr. Webb did not receive due process. Moreover, the trial did not err by denying qualified immunity to the individual defendants since they violated clearly established law.

1. The Trial Court Correctly Determined WSU Did Not Provide Mr. Webb Procedural Due Process.

The trial court correctly determined Mr. Webb did not receive sufficient procedural due process for a protected property interest in his financial aid scholarship. (RP 95:13-96:3). Property interests are created by "state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548 (1972). Here, Washington State

precedent already creates a protected property interest in Mr. Webb's financial aid scholarship, and clearly establishes the necessary procedural protections required prior to revoking such aid. *See Conard v. Univ. of Wash.*, 62 Wn. App. 664, 672, 814 P.2d 1242, 1247 (1991) *rev'd in part on other grounds by Conard v. Univ. of Wash.*, 119 Wn.2d 519, 834 P.2d 17 (1992). WSU previously acknowledged *Conard* is directly on point with respect to the type of process due prior to revoking a student's athletic scholarship. (RP 69:17-22; RP 70:18-71:1). It is undisputed that Mr. Webb has a constitutional right to due process, and "Fischer, Myott-Baker, and Lehr concede Webb had a property interest in the Agreement." (Cross-Appellant's Brief at 37); (RP 69:5-7).

Up until now, WSU argued that *Conard* governs the due process analysis and procedural standards for Mr. Webb's scholarship hearing. (RP 69-70). At oral argument, WSU's counsel explained that "really, the only case on point in Washington or elsewhere that I could find that talked about the interest at stake and the necessary process in terms of the revocation of an athletic scholarship was the *Conard* case, versus University of Washington." (RP 69:17-22). Presumably, because WSU recognizes its failure to meet the requirements under *Conard*, it now asserts that the case is not controlling. WSU argues the trial court should have instead weighed the competing governmental interests identified in factually divergent

cases, to determine “what process was due.” (Cross-Appellant’s Brief 36-37). This new position directly contradicts Washington law regarding the “minimum due process safeguards” that apply when the need for a student scholarship hearing arises. *See Conard*, 62 Wn. App. at 672. During oral argument, WSU’s counsel recognized as much while explaining the *Conard* case history and its precedential value. At that time, WSU’s counsel explained:

The Supreme Court in *Conard* reversed, saying, no, there was no property interest in this athletic scholarship because it was only for the academic year and then the right to extend that athletic scholarship was contingent upon both parties consenting and compliance with rules.

It's different than we have here, in terms of the property interest, *but in terms with the process due that the Court of Appeals talked about, that is still good precedent.*

(RP 70) (emphasis added).

After the trial court judge inquired as to what WSU’s counsel meant by “good precedent,” Mr. Taylor again explained that “in terms of the— what process was due . . . that is still good law according to the Supreme Court.” (RP 70:18-71:1). The Washington Supreme Court’s reversal was limited to the appellate court’s determination that two football players had a protected property interest in the “renewal” of their scholarships. *Conard*, 119 Wn.2d at 538. However, the Court did not overturn the standards related to due process and expressly affirmed the Court of Appeals “in all other

respects.” *Id.* WSU’s counsel informed the trial court that *Conard* is good law for determining what process is due in this situation. As a result, WSU should not be permitted to take a contrary position at this juncture by asserting that the trial court erroneously applied a rigid standard and relied on dicta when analyzing whether due process was provided. (Cross-Appellant’s Brief at 38-40); *See* RAP 2.5.

In any event, WSU’s reliance on *Mathews v. Eldridge* and other factually distinguishable due process cases is misplaced because *Mathews* merely provides a starting point for courts to weigh competing governmental and private interests to determine the “procedural protections [a] particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893 (1976). In *Mathews*, the court weighed the administrative burden on the government and the public’s interest in conserving scarce fiscal and administrative resources to determine the appropriate level of due process when terminating social security benefits. *Id.* at 348. That court concluded that a full evidentiary hearing was not required prior to terminating social security benefits – after considering the administrative burdens that would be imposed on the government and the public by requiring full evidentiary hearings in social security cases. *Id.* at 349.

Cross-Appellants set forth the “three core [*Mathew*’s] factors worthy of consideration,” but fail to provide any facts or analysis to

demonstrate how the trial court purportedly failed to consider: 1) the private interest affected by the official action, 2) the risk of an erroneous outcome and the probable value of additional substitute safeguards, and 3) the governmental interest involved, including fiscal and administrative concerns. (Cross-Appellant's Brief at 38); *see Mathews*, 424 U.S. at 335. Contrary to WSU's unsupported position, all three factors support the trial court's ruling.

First, Mr. Webb's interest in his scholarship contract is significant. Second, the risk that committees will rubber stamp administrative decisions is substantial and additional safeguards would have provided Mr. Webb with the ability to rebut the evidence presented against him while simultaneously creating an adequate record for appeal. Third, there is *no* evidence in the record which suggests providing additional safeguards would result in any administrative or fiscal burden on WSU in financial aid appeal hearings. Presumably, such hearings are rare, and WSU has not presented any evidence to suggest otherwise. Thus, based on the complete lack of factual evidence related to increased fiscal and administrative concerns, it is impossible for this Court to weigh the *Mathews* factors and arrive at a different conclusion, especially since the first and second *Mathews* factors clearly weigh in Mr. Webb's favor. *See Mathews*, 424 U.S. at 335.

In addition, and as previously stated, the *Conard* court has already conducted the *Mathews balancing test*:

We must balance competing interests of an efficient and reasonable administrative process with the student athlete's right to a meaningful hearing. *See Goss*, 419 U.S. at 579. Clearly, at least notice and an opportunity to be heard are required. In addition, the student athlete who faces nonrenewal of his or her scholarship based on misconduct must be given a written copy of any information on which the nonrenewal recommendation is based in time to prepare to address that information at the hearing. The student should be given the opportunity to present and rebut evidence, and the hearing must be conducted by an objective decision maker. The student has a right to be represented by counsel and to have a record made of the hearing for review purposes. Finally, the student has the right to a written decision from the hearing board setting forth its determination of contested facts and the basis for its decision.

We believe these requirements, while somewhat more stringent than those imposed in *Goss*, are in keeping with the reasoning of the Court in 419 U.S. 565. The additional safeguards are justified because the nature of the deprivation in this case exceeds the seriousness of the 10-day school suspension at issue in *Goss*, and because a hearing such as the one at issue here is relatively rare so no significant administrative difficulty should result. When the necessity for a hearing such as this does arise, the hearing must be conducted with the minimum due process safeguards outlined above. Otherwise, the opportunity for a hearing can be meaningless.”

Conard, 62 Wn. App. at 671-672 (internal citations omitted).

Here, the undisputed facts establish Mr. Webb was not provided a meaningful opportunity to rebut the evidence provided against him because he did not have the opportunity to listen to WSU present evidence at the hearing, thereby making it impossible to rebut the evidence and testimony

provided to the scholarship committee. (CP 564-567). WSU allows the athletic department to introduce documents and testimony – after excusing the student – thereby depriving student-athletes of any meaningful opportunity to rebut evidence presented during the hearing process. (CP 514, 564-566). Furthermore, Mr. Webb was not provided with a written decision which set forth the committee’s determination of contested facts and basis for its decision as required by *Conard*. (CP 564-569). Moreover, WSU admits the hearing was “not memorialized or recorded in any fashion.” (CP 567:21-23). This failure alone constitutes a due process violation because student athletes have the right “to have a record made of the hearing for review purposes.” *Conard*, 62 Wn. App. at 672.

WSU apparently recognizes the significant gap between the level of due process it provides in student conduct hearings relative to the due process provided in financial aid hearings. (Cross-Appellant’s Brief at 41). To downplay the obvious shortcomings in Mr. Webb’s appeal hearing, WSU argues “Webb’s comparison to student conduct hearings is inapposite – property interest in student hearings is more substantial than athletic financial aid.” (Cross-Appellant’s Brief at 41). In support of this position, WSU cites *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), and asserts that because the risk of expulsion is more serious than the loss of financial aid, WSU’s financial aid appeal process is adequate. WSU’s reliance on *Doe* is

misplaced because in a sexual misconduct case, a federal court weighed “the minimal burden that the university would bear by allowing cross-examination” and determined that in light of the minor administrative burden, a student should have been afforded an opportunity to cross-examine witnesses and rebut disputed facts so that the student would have an opportunity to address witness credibility at the hearing. *See Doe v. Baum*, 903 F.3d 575, 582-88 (6th Cir. 2018). The court found the risk of denying procedural due process safeguards “all the more troubling” in light of the due process provided in other types of student misconduct cases. Specifically, in *Doe* the court explained:

As it turns out, the university already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault. So the administration already has all the resources it needs to facilitate cross-examination and knows how to oversee the process. *See Univ. of Cincinnati*, 872 F.3d at 406 (noting that a university does not bear a significant administrative burden when it already has procedures in place to accommodate cross-examination). And, importantly, the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross-examination in this context.

Id. at 582.

Similarly, WSU already has an administrative process to facilitate meaningful hearings in student conduct hearings by making a record of the hearing and by giving students the ability to review the evidence that will be submitted against them in advance of the hearing. *See id.*; (CP 609-11;

857-869). WSU has not provided any justification for why it dismisses students during financial aid hearings or why it does not provide student-athletes with a reasonable opportunity to prepare for financial aid hearings. Holly Campbell, WSU's 30(b)(6) designee, testified that prior to student conduct hearings, students are provided with: 1) written notice of the allegations against him or herself; 2) written notice of all anticipated witness; 3) written notice of the documentary evidence submitted to the board; 4) an opportunity to review all of the evidence against him in advance of the hearing; 5) a reasonable opportunity to prepare for the hearing; 6) the ability to hear the witness testimony against him at the hearing; 7) the hearings are conducted under oath; and 8) students are provided the opportunity to cross-examine witnesses, among other things. (CP 609-11). As was the case in *Doe*, the record demonstrates that WSU already has existing administrative procedures in place to facilitate protection of student-athletes' due process rights. *See Doe*, 903 F.3d at 582. WSU has not presented *any* evidence to demonstrate that providing Mr. Webb basic due process protections would result in an unreasonable administrative burden on the school or the public. *Id.* It is difficult to imagine how allowing Mr. Webb to hear the evidence presented against him, or how recording the proceeding, would create an unreasonable administrative burden, especially

when the de minimis burden to do so in the rare situation is weighed against Mr. Webb's interest in his scholarship.

Even if the minimum due process standards set forth in *Conard* could adequately be described as dicta (notwithstanding WSU's prior contrary representations to the trial court), the balancing considerations in this case nonetheless weigh in favor of providing students a meaningful opportunity to hear the evidence presented against them and to provide a meaningful rebuttal on disputed points prior to terminating promised scholarships. The loss of financial aid will obviously result in some students' inability to pay for an education and attend college, and WSU's assertion that student conduct cases are inapposite is unfounded. At a minimum, student athletes should be provided a written decision setting forth the rationale for decisions, including factual determinations on contested facts, and a record should be made to ensure adequate safeguards exist to protect student athletes' rights on appeal. The hearing at issue in this case "is relatively rare so no significant administrative difficulty should result." *See Conard*, 62 Wn. App. at 672.

As a result, although it is unnecessary for this Court to weigh the competing interests of the parties at this juncture in light of Washington precedent, to the extent the Court determines it is appropriate to weigh the lack of procedural protections provided to Mr. Webb against the minor

administrative burden associated with safeguarding student athlete's constitutionally protected rights, the Court should still reach the same conclusion as the trial court. Therefore, this Court should affirm the trial court's determination that Mr. Webb did not receive adequate procedural due process.

2. The Trial Court Correctly Determined Fischer, Myott-Baker and Lehr Are Not Entitled to Qualified Immunity.

“If a person has a legitimate claim to entitlement, he or she is guaranteed the protections of due process.” *Conard*, 62 Wash. App. at 671. All parties agree Mr. Webb has a legitimate claim to entitlement and that he “had a property interest in the agreement, cancellation of which entitled him to notice and opportunity to be heard.” (Cross-Appellant's at 37). Put another way, it is undisputed that clearly established constitutional law and Washington precedent requires WSU and its administrators to provide students notice and an opportunity to be heard prior to cancelling promised scholarships. (Cross-Appellant's Brief at 37); (RP 69:5-9); *Conard*, 62 Wn. App. at 671; *Goss v. Lopez*, 419 U.S. 565, 573, 95 S. Ct. 729 (1975).

Based on minimum due process standards established both under existing federal law and Washington State law, the trial court properly determined Fischer, Myott-Baker, and Lehr are not entitled to qualified immunity because their “conduct is not objectively reasonable” in light of

existing precedent. *See Jones v. State*, 170 Wn.2d 338, 355, 242 P.3d 834 (2010) (stating government officials are not immune from suit when performing discretionary functions if their conduct is not objectively reasonable under pre-existing law). Qualified immunity does not apply when existing precedent places a statutory or constitutional question beyond debate. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011). Here, Mr. Webb’s constitutional right to a meaningful hearing is beyond debate.

“The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment” *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S. Ct. 1983 (1972). Thus, the notice of hearing and the opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187 (1965); *See also Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) (recognizing the “fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (internal quotations omitted)).

Since there is no dispute that Mr. Webb has a clearly established constitutional right in his scholarship, and a right to meaningful notice and an opportunity to be heard, the question before this Court is whether the scholarship appeals board failed to provide a meaningful hearing based on established Washington procedural requirements in *Conard* and basic due process considerations provided in federal case law. Dismissing Mr. Webb from his own hearing cannot be considered objectively reasonable conduct under the most basic due process analysis because it should have been patently obvious to any reasonable person that doing so would deprive Mr. Webb of a meaningful opportunity to be heard, especially when he was kept in the dark about the evidence that would be presented against him at the hearing. Mr. Webb's hearing was not conducted in a "meaningful manner" because he was denied the opportunity to address the accusations leveled against him while the athletic department presented its evidence. *See Vanelli v. Reynolds School Dist.*, 667 F.2d 773, 779-780 (9th Cir. 1982) (explaining that fairness is a flexible notion, but at a minimum one must be given notice and an opportunity to be heard in a meaningful manner through an opportunity to confront the evidence adduced against him, specifically the "evidence with which the decision maker is familiar").

WSU has not provided any justification for why it was necessary to excuse Mr. Webb while the school heard testimony from the athletic

department, and it failed to provide any legal authority to demonstrate the committee's unconstitutional conduct at the hearing should be considered objectively reasonable. Additionally, WSU's failure to record the hearing exacerbates the dismissal of Mr. Webb from the hearing because it is now impossible for this Court to review the hearing transcript on appeal since there is simply no way to review testimony and evidence the committee considered in making its decision, thereby precluding any meaningful appeal. To further compound these inexcusable errors, the committee merely informed Mr. Webb that Mr. Leach's decision was being upheld and that the decision was final. (CP 680).

WSU takes issue with the trial court's application of *Conard* and asserts the "Washington Supreme Court overturned that decision, holding two University of Washington football players did not have a property interest . . . because of the terms of the contract at issue." (Cross-Appellant's Brief at 45-46). However, there is no dispute that the terms of the contract at issue in Mr. Webb's case did create a property right. (Cross-Appellant's Brief at 37); (RP 69:5-7). As demonstrated previously, the law is clear with respect to Mr. Webb's property interest and the level of protections required because the Washington Supreme Court elected not to alter the due process hearing protections required by the lower court and instead affirmed the court of appeals in all other aspects. *See Conard*, 119 Wn.2d at 538.

Fischer, Myott-Baker, and Lehr ask the Court to reverse the trial court's finding that qualified immunity does not apply because they assert "there is no way reasonable officials . . . would realize that what they were doing violated Webb's constitutional rights when no precedent recognizes such right." (Cross-Appellant's Brief at 46). In reality, however, WSU administrators, including Fisher, Myott-Baker, and their counsel, were well-aware of the need to provide adequate due process to students. (CP 698-701); (RP 70). Moreover, the contention that it is unreasonable to expect government agencies and their employees to be aware of existing precedent and provide minimum due process is problematic given that Fischer, Myott-Baker, and Lehr all acknowledge Mr. Webb has a protected property interest in his scholarship. (Cross-Appellant's Brief at 37); (RP 69:5-7). Moreover, this notion is undercut by WSU's counsel's assertion that the due process principles laid out in *Conard* were good law.

Additionally, WSU cites cases from other jurisdictions that lacked instances which specifically "establish due process rights for the revocation of financial aid." (Cross-Appellant's Brief at 46). WSU's reliance on Oregon and federal law is misplaced because there is Washington precedent which directly addresses the procedural due process required in the student scholarship context. *Conard*, 62 Wn. App. at 671-672. Moreover, WSU and Fischer, Myott-Baker, and Lehr are represented by the Washington State

Attorney General's Office, which is made up of 27 different legal divisions and more than 500 attorneys. WSU and its employees have immense legal resources at their disposal and public employees should not be permitted to deprive individuals of constitutionally protected interests and simultaneously avoid all liability by claiming ignorance of existing law. Even if this Court determines that *Conard* does not reasonably put government officials on notice of the specific procedural protections required in scholarship hearings, federal law nonetheless establishes that persons must be provided a meaningful opportunity to notice and to be heard. *Armstrong*, 380 U.S. at 552; *see also Gourley*, 158 Wn.2d at 467. Denying Mr. Webb the ability to hear the evidence against him should not be viewed as objectively reasonable.

As outlined in Mr. Webb's opposition to WSU's motion for summary judgment, WSU was previously involved in two separate lawsuits where students alleged due process violations based on the school's failure to keep an accurate record of appeal proceedings. (CP 698-701). WSU was fully aware of procedures that would provide students with meaningful hearings and adequate due process protections and safeguards. (CP 698-701.) During a 30(b)(6) deposition, WSU's 30(b)(6) designee testified that the school's student conduct office altered its process and procedures for student conduct appeals after *Heredia vs. WSU*, case number 16-2-00085-

0, to ensure that WSU creates an adequate record for administrative hearings. (CP 615). Despite its awareness of the requirement to create an adequate record to protect student's rights, WSU chose to ignore this requirement and failed to create any meaningful record of Mr. Webb's hearing. (CP 566-567).

Karen Fischer has served as the Associate Dean of Students since 2014. (CP 165). During her tenure as Associate Dean of Students, she has occasionally been asked to sit on interdepartmental committees, including the Financial Aid Appeals Committee. (CP 165). Ms. Fischer submitted a declaration which states: “[a]s a Financial Aid Appeals Committee member, I am aware of the importance of financial aid to student-athletes. I am also familiar with the concept of due process.” (CP 166). Similarly, Kelly Myott-Baker has been employed by WSU as Assistant Director of Undergraduate Admissions since 2014. (CP 170). Ms. Myott-Baker also provided a declaration stating she is aware of the importance of financial aid to students and “familiar with the concept of due process.” (CP 171). Ms. Myott-Baker “heard from Deputy Director of Athletics, Mike Marlow, Football Chief of Staff, Dave Emerick, and Director of Football Operations, Antonio Huffman” *after* the committee excused Mr. Webb, and common sense dictates that it was impossible for Mr. Webb to rebut evidence presented by WSU because he was excluded from the room while the athletic department

presented evidence against him. (CP 172; 564-567). By denying Mr. Webb a meaningful opportunity to rebut evidence the athletic department presented in his absence and by failing to create a record of the proceeding, Fischer, Myott-Baker, and Lehr violated clearly established minimum procedural due process requirements under existing precedent. *See Conard*, 62 Wn. App. at 671-672; *see also Armstrong*, 380 U.S. at 552.

Finally, WSU suggests that Fischer, Myott-Baker, and Lehr should be granted immunity because they were merely “volunteering their time for a financial aid hearing.” (Cross-Appellant’s Brief at 46). However, the Washington legislature already provides statutory immunity for volunteers in instances where individuals are not being paid, i.e., when they are truly acting as volunteers. *See RCW § 4.24.670*. The statute defines “volunteer” as “an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or any other thing of value, in excess of five hundred dollars per year.” *Id.* WSU scheduled Mr. Webb’s hearing during the middle of the workday on Wednesday, November 1, 2017. (CP 509). Fischer, Myott-Baker, and Lehr are all directly employed by WSU, and there is no evidence in the record to suggest that they are paid less than \$500.00 per year. (CP 165; 170; 174). Employees of a public universities are obviously paid to wear multiple hats

to fulfill the needs of their employer. Given that the hearing was held during work hours, and given that Fischer, Myott-Baker, and Lehr are paid for their time, they cannot be considered “volunteers” for purposes of determining whether immunity applies. In any event, this issue has not been raised by Fischer, Myott-Baker, and Lehr previously, and to the extent their status as purported volunteers has any application or bearing on immunity, there is no evidence in the record which establishes the committee members meet the statutory definition set forth in RCW §4.24.670(5)(e).¹

Until now, Fischer, Myott-Baker, and Lehr’s counsel agreed that the *Conard* due process standard is “good law” as far as the Washington State Supreme Court is concerned. Based on the acknowledgement that Mr. Webb has a property interest, and WSU’s prior admission that *Conard* provides the procedural requirements for due process in the scholarship context, Fisher, Myott-Baker, and Lehr’s conduct cannot be considered

¹ With respect to quasi-immunity, the trial Court erroneously determined quasi-judicial immunity should shield individuals because people would not expect to “volunteer and get sued over something you did as a volunteer.” (RP 106). Given that the legislature has provided a statutory mechanism to protect legitimate volunteers, it was improper for the trial court to find Fischer, Myott-Baker, and Lehr are volunteers. Consequently, at summary judgment it was unnecessary to grant Fischer, Myott-Baker, and Lehr quasi-judicial immunity based on public policy concerns over the need to insulate volunteers from liability.

objectively reasonable. (RP 70-71). As a result, the trial court should be affirmed with respect to the qualified-immunity issue.

3. Mr. Leach’s Statements and the Third-Party Conduct Are Relevant to Mr. Leach’s Credibility and the Tortious Interference Claim.

Mr. Leach’s representations to the appeals committee combined with the athletic department’s prior response (or lack thereof) to other instances of student athlete misconduct is not a red herring – it is directly relevant to the due process analysis because it puts Mr. Leach’s credibility at issue. *See Doe*, 903 F.3d at 582-83 (reasoning that students should be provided heightened due process protections in instances when the accuser’s credibility is at issue). Mr. Leach’s misrepresentations to the appeals committee highlight the need for public institutions to, at a minimum, provide procedural safeguards to students through the opportunity to hear and rebut the evidence presented against them.

The disproportionate way Mr. Leach treated other students directly undermines the information considered by the appeals committee. Mr. Leach led the appeals committee to believe that players are automatically and consistently cut for specific cardinal offenses. (CP 507). Mr. Leach further represented that “[e]very player is held to the same standards here and we have demonstrated that talent, athletic ability, age, or classification have no bearing on whether we keep or remove a player that violates any of

our team rules.” *Id.* The reality is that other players hit women, committed assault, and were arrested for theft, and WSU nonetheless permitted the players to continue playing through the football season. (CP 582-85, 588-89, 629-30, 642-43, 661-63). Cross-Appellant’s assertion that Mr. Webb was not treated differently than other WSU football players is directly refuted by the record. Here, all criminal charges against Mr. Webb were dismissed. (CP 686-689). WSU’s Office of Student Conduct investigated the Walmart incident and found Mr. Webb “not responsible” for theft and dismissed the charges related to the Walmart incident, but Mr. Webb was immediately cut from the team for “stealing from Walmart” before the athletic department had an opportunity to investigate the allegations. (CP 507; 682). Yet, Mr. Leach advocated for one player that was arrested for robbery and assault and allowed him to play on the team while the criminal process played itself out. (CP 630). The disproportionate treatment of players demonstrates Mr. Leach’s hostility towards Mr. Webb and Mr. Leach’s animus raises genuine issues of material fact with respect to whether Mr. Leach was acting outside the scope of his employment.

C. REPLY ARGUMENTS IN SUPPORT OF MR. WEBB

WSU went to great lengths to persuade this Court that WSU justifiably terminated Mr. Webb’s athletic scholarship by presenting evidence to show Mr. Webb was not a perfect student-athlete. In doing so,

WSU argues many contested facts that are unrelated to the legal questions before this Court on appeal, and those factual issues should be weighed by a jury on remand. Cross-Appellant's do not provide a "fair statement of the facts and procedures relevant to the issues presented for review" as required by RAP 10.3(5), primarily because many of the facts presented are disputed and not relevant to the assignments of error on appeal. Given that Mr. Webb's workout routine, dismissed criminal charges, and weekly academic advisor meetings are not pertinent to the legal questions before this Court, limited space is spent addressing the numerous disputed facts in WSU's brief. However, a lack of response to WSU's numerous factual assertions should not be construed as Mr. Webb's agreement or admission.

1. The Trial Court Erred By Granting Fischer, Myott-Baker, and Lehr Quasi-Judicial Immunity.

The subjective expectations of the committee members are irrelevant to whether Fischer, Myott-Baker, and Lehr are entitled quasi-judicial immunity. The trial court erred by concluding Fischer, Myott-Baker, and Lehr are immune based on concerns over whether "volunteers"² expect immunity. In doing so, the court failed to adequately consider

² As set forth previously, the Washington legislature provides immunity for actual volunteers, and there is no evidence that the individual defendants meet the statutory definition of "volunteer." *See* RCW § 4.24.670.

whether WSU's hearing process is functionally similar enough to a judge to warrant immunity.

Given the important public policy considerations, and a person's lack of recourse when immunity is imposed, it is critical that mechanisms and safeguards are in place to prevent injustice and correct errors. *Taggart v. State*, 118 Wn.2d 195, 204, 822 P.2d 243 (1992) (explaining that "ideally, the doctrine should be applied only when the system is otherwise structured to provide safeguards against judicial errors"). In *Taggart*, the court explained "[t]he essential question in cases applying the quasi-judicial immunity doctrine is whether the challenged actions were functionally similar enough to those performed by a judge to warrant the immunity." *Id.* at 204-205.

Cross-Appellants assert that Mr. Webb ignores the numerous safeguards that were present, while simultaneously failing to provide any explanation for excusing Mr. Webb from the hearing or failing to make a record. (Cross-Appellant's Brief at 48-49). Moreover, WSU fails to recognize that the various safeguard factors identified by federal courts "do not apply with the same force in the quasi-judicial land use setting as they do in the purely judicial setting." *See Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 109, 829 P.2d 746 (1992) (explaining "the nature of

the administrative process is distinctly less adversarial than the judicial process.”) In *Lutheran Day Care*, the court recognized that:

[E]rrors in an administrative proceeding are less likely to be corrected on appeal than errors in a judicial proceeding. Administrative decisions such as this one are usually appealable. However, the appeal is usually limited to the record established in the agency hearing which, due to the previously explained evidentiary and procedural problems, may be inadequate or one sided. The appellate court must also give deference to the agency's interpretation of laws when the agency is uniquely qualified to interpret those laws. As a result, appeal from an administrative decision is less likely to correct errors in the prior decision than an appeal from a judicial decision would be.

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 109, 829 P.2d 746 (1992) (internal citation omitted). To warrant immunity, given the one-sided nature of WSU’s administrative proceeding, it was critical for WSU to provide mechanisms to guard against error, and at the very least, make a record for appeal to safeguard against errors. *See Taggart*, 118 Wn.2d at 204. By failing to make a record, WSU effectively prevented Mr. Webb from addressing any of the evidence considered during WSU’s financial aid hearing for purposes of future appeals. This failure should preclude granting quasi-judicial immunity to Fischer, Myott-Baker, and Lehr.

Based on prior lawsuits in student conduct proceedings, WSU was well-aware of the need to protect against errors and provide safeguards to students. (CP 609-615). It nonetheless failed to adopt procedural safeguards

in financial aid hearings, and it made it virtually impossible to consider the administrative record on appeal. (CP 566-567). There is no written decision that sets forth the contested facts and rationale of the committee and Mr. Webb was not apprised of any further appeal rights. Instead, he was merely told the “decision is final.” (CP 680).

In some instances, public policy concerns favor insulating public employees that are performing quasi-judicial functions. However, Washington law provides that for immunity to apply, purportedly quasi-judicial functions must have adequate safeguards to protect the integrity of the process and the interests of persons involved. WSU clearly failed to provide adequate safeguards to protect the interest of its student-athletes in financial aid hearings. The public policy concerns in this matter favor allowing Mr. Webb to proceed with his claims, particularly given that the individual defendants will presumably be indemnified for the damages caused pursuant to their employment contracts with WSU. Granting Fischer, Myott-Baker, and Lehr immunity effectively denies Mr. Webb recourse for clear due process violations and will allow universities and public officials to engage in similar conduct in the future with impunity, which would be destructive precedent. Given the complete lack of safeguards, it was improper for the trial court to conclude that WSU’s

financial aid hearing was functionally comparable enough to judicial action to warrant immunity.

2. The Court Erred By Finding The Student Athlete Handbook Was Not A Bilateral Contract.

This Court should not weigh the evidence to make a factual determination as to which party breached the contract first; it should merely determine whether Mr. Webb presented sufficient facts for a jury to conclude that the Handbook constitutes an enforceable contract. WSU erroneously asserts that Webb “does not dispute his non-compliance with the Agreement’s terms.” (Cross-Appellant’s Brief at 21). Mr. Webb does not concede that he breached the Agreement. To the contrary, he maintains that WSU wrongfully breached a bilateral contract by failing to conduct an investigation and by failing to follow the procedures set forth in the Student Athlete Handbook (the “Handbook”). Mr. Webb should be permitted to present testimony and evidence to a trier of fact to weigh the disputed factual issues.

As WSU acknowledges in its brief, “[i]n constructing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is

otherwise clear and unambiguous.” *Mayer v. Pierce Cty. Med. Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (Cross-Appellant’s Brief at 21).

The first page of the Handbook expressly provides that “WSU is committed to developing and maintaining a partnership” with student athletes and the Academic Standards Program is designed to achieve numerous objectives, including to “facilitate the equitable treatment of student athletes.” (CP 327). Mr. Leach testified that he was familiar with the procedures contained in the Handbook and that he was not allowed to deviate from the policies set forth therein. (CP 632). Given that the language on the very first page of the Handbook expressly provides that the programs and procedures contained in the Handbook exist to “systematize” the academic expectations for all student athletes and to facilitate “equitable treatment,” it was reasonable for Mr. Webb to expect that WSU had programs and policies in place to facilitate equitable and systematic treatment—and that WSU would follow its own policies. (CP 327).

WSU relies heavily on *Ruegsegger v. Western NM Univ. Bd. Of Regents*, a non-binding New Mexico case wherein a court determined a student handbook did not create a bilateral contract under a factually distinguishable set of circumstances. *See Ruegsegger v. Western NM Univ. Bd. of Regents*, 141 N.M. 306, 154 P.3d 681 (2006). The handbook in that case contained a clear disclaimer putting students on notice that the

provisions therein were “not to be regarded as a contract.” *Id.* at 312. As a result, the court reasoned that the language was “of a non-promissory nature” and instead “merely declarations of [a] general approach.” *Id.* Conversely, the Handbook provided to Mr. Webb does not indicate that the procedures are mere guidelines, but instead includes specific procedures for investigating issues while promising that WSU is committed to facilitating fair treatment. (CP 327, 359).

WSU also contends that Washington cases involving employer/employee relationships are neither analogous nor comparable and it asserts this Court should ignore other instances where Washington courts have held employee handbooks may create enforceable contracts. (Cross-Appellant’s Brief at 22-23). Ironically, the New Mexico *Ruegsegger* court specifically looked to employment cases for guidance because the court recognized that “the question of whether a student handbook creates a contractual relationship between a student and a post-secondary educational institution [was] an issue of first impression in New Mexico.” *Ruegsegger*, 141 N.M. at 312. (stating “we look to cases that have arisen in the employment context for guidance.”) In short, WSU’s contention that employer/employee cases are not analogous directly conflicts with the rationale and analysis applied by the New Mexico court because that

jurisdiction expressly recognized the analogous nature of the employer/employee and university/student relationship. *Id.*

In any event, whether the Handbook constitutes a bilateral contract should be determined on Washington contract law. Similar to the situation in *Thompson*, through clear promises of fair and systematic treatment, WSU created an “atmosphere of fair treatment” and specifically led its students to expect that WSU would follow the systematic procedures set forth in the Handbook. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); (CP 327). WSU easily could have included disclaimer language in its Handbook to put students on notice that the school was not required to follow its own policies, as was the case in *Ruegsegger*. *See Ruegsegger*, 154 P.3d at 687.

WSU created an expectation for its students and “thus an obligation of treatment in accord with those written promises.” *Thompson*, 102 Wn.2d at 230. The Washington Supreme Court has held that whether representations amount to an enforceable promise, i.e., a contract, is a question of fact. *See Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty*, 189 Wn.2d 516, 540, 404 P.3d 464 (2017). Given the clear language in the Handbook, the absence of any disclaimers, and Mr. Leach’s admission that he understood he was expected to follow the policies contained in the Handbook, this Court should remand the issue to a trier of fact to decide

whether WSU was obligated to follow the policies in the Handbook it provided to student-athletes.

3. The Trial Court Improperly Concluded the University did not Breach a Contract.

WSU acknowledges that it did not follow the procedures included in its Handbook and instead asserts that it was not required to follow the procedures. (Cross-Appellant’s Brief at 20-23). The trial court concluded WSU did not breach a contract based on its erroneous determination that the Handbook did not create bilateral contract. Here again, WSU represented that the primary objective of the Handbook was to provide specific procedures to facilitate “equitable treatment of student-athletes” and to create a partnership between the Athletics Department and student athletes. (CP 327). It is undisputed that WSU cut Mr. Webb from the team without performing any meaningful investigation. (CP 626-628). Consequently, if this Court determines the language in the Handbook should be weighed by a jury to ascertain whether the language is sufficient to create a contract under Washington law, the trial court erred by ruling that WSU did not breach a contract.

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4. The Trial Court Improperly Weighed the Evidence with Respect to the Intentional Interference Claim Against Mr. Leach.

The trial court should not have weighed the evidence at summary judgment, and it should have construed all evidence in a light most favorable to the non-moving party. Instead, the court ignored factual issues concerning Mr. Leach's personal animus and determined that he acted with the intent "to benefit his team by getting rid of a troubled player." (RP 117). It is beyond dispute that other players committed objectively worse offenses than Mr. Webb, and Mr. Leach nonetheless allowed those players to remain on the team.

Contrary to WSU's assertions that Mr. Webb failed to present any evidence to raise genuine issues of material fact, the summary judgment briefing contains numerous facts which demonstrate that Mr. Leach did not act in good faith. (CP 943-947). Mr. Webb met his burden of production by presenting genuine issues of disputed facts to the trial court which demonstrate that Mr. Leach interfered with Mr. Webb's contract based on his personal dislike for Mr. Webb. A trier of fact should determine whether Mr. Leach was acting outside the scope of his employment. *See Renz v. Spokane Eye Clinic, P.S. 114 Wn. App. 611, 622, 60 P.3d 106 (2002)* (stating the court should allow the jury to weigh evidence once the burden of production has been met).

5. The Independent Duty Doctrine Is Inapplicable.

WSU insists that all duties owed to Mr. Webb are traceable to the financial aid contract and that any tort liability is therefore barred by the independent duty doctrine. (Cross-Appellant's Brief at 31-32). However, WSU and its employees owe a duty independent of the contract to not violate Mr. Webb's constitutionally protected due process rights, and to conduct administrative hearings in accordance with Washington law. Thus, the tort duty owed to Mr. Webb does not arise via contract, but rather from constitutional protections, and Washington State statutory and regulatory requirements. *See* RCW § 34.05.484-491; WAC 504-04-010. WSU's duty to provide due process is not expunged simply because concurrent contractual obligations also exist. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 393, 241 P.3d 1256 (2010) (stating that "the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract.") Here, WSU's misconduct implicates a duty that arises under Washington and federal law, not the parties' contract.

WSU's child abuse hypothetical is not persuasive because the imaginary person *reporting* abuse would likely not owe an independent tort duty to the child's parents (nor would the hypothetical reporter likely owe contractual obligations to the parent). Under WSU's rationale, a negligent

defendant in a personal injury action would be able to avoid all tort liability simply by demonstrating the existence of an initial contractual relationship with the plaintiff. For example, if a contractor negligently caused physical injury to a homeowner it was working for, it could argue that it was relieved of all liability if the relationship was indirectly traceable to a separate contract.

Washington courts recognize that tort claims may proceed so long as there is a duty which arises independent of the contract. *Eastwood*, 170 Wn.2d at 394. Similarly, in *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, the Washington Division I Court of Appeals explained “the independent duty doctrine is not so broad as to bar claims based on extra-contractual duties between parties to a contract.” *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wash. App. 436, 445, 261 P.3d 664, 669 (2011), aff'd, 179 Wash. 2d 84, 312 P.3d 620 (2013). Here, WSU had an “extra-contractual” duty to provide Mr. Webb with procedural due process at his hearing, and the independent duty doctrine is not so broad that Mr. Webb’s negligence claim is barred.

WSU asserts it “can find no precedent—whether in the state of Washington or elsewhere—that supports the existence of a tort duty to comply with due process.” (Cross-Appellant’s Brief at 32). However, both Washington and federal courts recognize that Section 1983 due process

claims are “constitutional torts.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 652, 935 P.2d 555 (1997) *overruled in part by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019); *see also Burt v. Abel*, 585 F.2d 613, 615 (1978) (stating “a deprivation of procedural due process is an independent constitutional tort, actionable under § 1983”). *Sintra, Inc.* was recently partially overruled on the limited grounds that it may no longer be interpreted as requiring heightened scrutiny for substantive due process challenges to Section 1983 claims. *See Chong Yim*, 194 Wn.2d at 703. However, Washington courts and federal courts do recognize that Section 1983 claims exist “to afford plaintiffs a cause of action for constitutional violations on the part of local government bodies and other state officials,” and those courts expressly recognize that Section 1983 due process claims are “essentially a constitutional tort.” *Sintra*, 131 Wn.2d at 652. (emphasis added). Consequently, WSU and its employees owed Mr. Webb a duty to not violate his constitutionally protected due process rights.

6. The Public Duty Doctrine Does Not Apply.

“The traditional public duty rule of nonliability does not apply where a regulatory statute by its terms evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons.” *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). Here, 42 U.S.C. § 1983 establishes a clear legislative intent to protect a particular

class of persons, i.e., those that are deprived of liberty or property interests, and to impose liability in instances where public officials deprive persons of constitutionally protected rights. *See* 42 U.S.C. § 1983. When applying the public duty doctrine, Washington courts examine whether the alleged duty is "a broad general responsibility to the public at large rather than to individual members of the public." *Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006).

The public duty doctrine is not applicable because it “simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care.” *Osborn v. Mason County*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Mr. Webb has demonstrated that WSU owed him a specific duty of care to conduct his administrative proceeding in a manner that complies with federal and state procedural due process requirements. Assuming *arguendo* that the public duty doctrine is applicable, the special relationship exception applies because WSU made assurances that it had procedures to investigate alleged misconduct and Mr. Webb had a justifiable reliance that WSU would provide him procedural due process prior to revoking his scholarship. *See Honcoop*, 111 Wn.2d at 191. Accordingly, the trial court erred in determining that the public duty doctrine applies.

D. CONCLUSION

Based upon the foregoing Mr. Webb respectfully requests that this Court uphold the trial court's determination that Mr. Webb's due process rights were violated, and that qualified immunity does not apply. Mr. Webb also requests that this Court reverse the trial court's order granting WSU's Motion for Summary Judgment for the reasons set forth herein.

RESPECTFULLY SUBMITTED this 30th day of March, 2020.

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PROOF OF SERVICE

In accordance with RAP 18.5 and 18.6, and RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be delivered to the email addresses below a true and correct copy of *Reply Brief of Appellant/Cross Respondent Zaire Webb*:

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Dated: March 30, 2020

/s/ Tyler S. Waite
TYLER S. WAITE

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March 30, 2020 - 2:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37051-8
Appellate Court Case Title: Zaire Webb v. Washington State University, et al
Superior Court Case Number: 18-2-00055-4

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