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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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

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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,

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**Zaire Webb's Appellate Brief**

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## **A. INTRODUCTION**

Plaintiff Zaire Webb was a student-athlete with a full athletic scholarship at Washington State University (“WSU”) as a member of its football team. The scholarship was guaranteed so long as Mr. Webb remained eligible and followed team rules. During the course of his tenure on the football team, Mr. Webb was cited for third-degree theft at Wal-Mart. As a result, Michael Leach, head football coach at WSU, immediately cut Mr. Webb from the football team with full knowledge it would result in the loss of his athletic scholarship. Such dismissal was contrary to WSU’s required policies and procedures for situations when a student-athlete was accused of criminal conduct. Compounding his errors, Mr. Leach blatantly lied to the Athletic Award Appeals Committee (“the Appeal Board”) reviewing Mr. Webb’s dismissal and termination of his scholarship due to his personal animus against Mr. Webb and in order to have the dismissal upheld by the Appeal Board.

The Appeal Board only made matters worse by failing to provide Mr. Webb even the slightest due process protections during his hearing. For example, Mr. Webb did not hear any of the testimony and allegations against him at the hearing as he was excused at the time the Athletic Department provided testimony, the testimony was not under oath, Mr. Webb was not provided with an opportunity for cross-examination, the

hearing was not transcribed or recorded in any fashion and Mr. Webb was erroneously told that the decision of the Appeal Board was “final” and no appeal was possible. All the foregoing errors seriously deprived Mr. Webb of notice and an opportunity to be heard in violation of his due process rights. The trial court agreed such failures did violate Mr. Webb’s due process rights and the members of the Appeal Board were not entitled to qualified immunity, but felt an adverse ruling against the Appeal Board would discourage the volunteers serving on the Appeal Board, so the trial court found quasi-judicial immunity applicable to absolutely shield the members.

Further complicating matters, the trial court ruled WSU was not required to follow any of its express policies contained in the Student-Athlete Handbook (“Handbook”). Rather, the policies only bound student-athletes regardless of the nature of the language contained in the Handbook. Such a determination is contrary to long-standing contract interpretation case law regarding employee handbooks in the employment setting.

Additionally, the trial court committed error by weighing the conflicting evidence and finding Mr. Leach was acting in good faith by attempting to benefit WSU. Mr. Leach cut Mr. Webb from the football team contrary to WSU’s policies and then lied to the Appeal Board in order to justify his rush to judgment against Mr. Webb, which was motivated in part

by his personal animus toward Mr. Webb. As such, the trial court impermissibly weighed the evidence at the summary judgment stage.

Finally, the Court erred by finding no special relationship between Mr. Webb and Defendants based upon other jurisdictions' case law holding no such relationship between a college student and college existed. However, the foregoing relationship is not the relationship at issue. The relationship at issue is one between a public university financial aid appeal board and the appellant. The duty to conduct the hearing in accordance with basic due process protections is not owed to the public – it is owed solely to Mr. Webb. Accordingly, this Court should reverse the trial court's order dismissing the case with prejudice.

## **B. ASSIGNMENTS OF ERROR**

1. Does quasi-judicial immunity apply when basic due process rights have been violated and a right of review was denied?
2. Can a public university require its students to follow the provisions of a handbook, yet fail to follow such provisions with impunity?
3. Can a public employee knowingly misrepresent facts to a review panel and still be acting within the course and scope of his employment?
4. Is there a special relationship between a university and its student-athlete financial aid appellants?

**C. STATEMENT OF THE CASE**

**1. Mr. Webb Was Given A Full Scholarship To Attend WSU.**

Mr. Webb was recruited by WSU in the late 2017 recruiting process as WSU believed he had potential as a defensive back. (CP 210) As a result, Mr. Webb was provided a full financial aid offer from WSU for the spring semester of 2017 as well as the following four academic years at 100% aid. (CP 600-601) That offer was guaranteed as long as Mr. Webb stayed eligible per NCAA eligibility rules, followed WSU athletic department and team rules and remained enrolled at the institution. (CP 599)

**2. Mr. Leach Cut Mr. Webb From The WSU Football Team Without Any Meaningful Investigation Into The Facts And Contrary To WSU's Policies.**

On October 4, 2017, Mr. Webb entered a Wal-Mart store in Pullman, Washington with his teammate, Anthony White. (CP 5) Mr. White placed various items of merchandise into his shopping cart and proceeded to the self-checkout register. *Id.* Mr. White then began bagging various items of merchandise and placing them into his shopping cart without scanning such items. *Id.* Upon attempting to exit the store, a loss prevention associate temporarily detained Mr. White and Mr. Webb and contacted the Pullman Police Department. *Id.* Officer Aaron Breshears responded to the Wal-

Mart store and eventually cited Mr. White and Mr. Webb for violations of RCW 9A.56.050, theft in the third degree. *Id.*

Mr. Leach learned that Mr. Webb was arrested at Wal-Mart for misdemeanor theft the day after his arrest, October 5, 2018. (CP 624; 18) Antonio Huffman called Mr. Leach to inform him that Mr. Webb and Mr. White were arrested for shoplifting. (CP 625-626) After receiving the phone call, Mr. Leach broke from WSU's policies and procedures and cut Mr. Webb from the football team immediately, without placing him on suspension:

Q: What did you do after you got the call from Antonio Huffman on your cell phone?

A: Told him to cut them.

Q: Right away?

A: Yep.

Q: To cut both Zaire and Anthony White?

A: Yep.

Q: Did you do any independent investigation into the allegations of theft?

A: I may not have told him to cut them on the phone call. We called law enforcement. I had a conversation with Gary [Jenkins]. He went through the details of it, the specifics. Well - - and then I said somewhere in there - - I remember that day I think we cut him. I think it was that day. It was after talking to Gary, though, I believe.

(CP 626) Mr. Leach freely admitted his lone conversation with Chief Jenkins was the only “investigation” he performed into the facts surrounding Mr. Webb’s arrest:

- Q: Anything you wish you would have done to investigate, but didn’t or couldn’t?
- A: No - - well, the only thing I wish is I wish I would have cut them sooner.
- Q: But nothing as it relates to your investigation into the allegations of theft, right?
- A: Well, I guess maybe - - I mean, in just thinking about it, maybe in Anthony’s case, but Zaire’s case, I wish I would have cut him a long time ago. Zaire was just a chronic issue.
- Q: Did you interview Zaire Webb prior to cutting him?
- A: No.

(CP 628) In fact, Mr. Leach admitted he had no specific recollection that he viewed the Wal-Mart surveillance video prior to cutting Mr. Webb from the football team. (CP 627)

Mr. Leach decided to cut Mr. Webb from the football team without following WSU’s written policies and procedures and with full knowledge that it would result in Mr. Webb’s athletic scholarship revocation. (CP 623)

The Handbook provides:

In the case of behavioral problems which involve formal criminal charges by a law enforcement agency, the involved student-athlete will be placed on suspension by the

department of athletics until the facts of the incident are reviewed.

### **DISCIPLINARY PROCESS**

- In the event the student-athlete is charged with a felony, absent extraordinary circumstances as determined by the director of athletics and sport supervisor, he/she will not be permitted to represent WSU athletics in outside competition until such time as the case is resolved and all court, University and athletics department conditions for reinstatement have been met;
- Absent extraordinary circumstances as determined by the director of athletics and sport supervisor, misdemeanor charges and subsequent discipline, therefore will be handled by the head coach, after review by the director of athletics and sport supervisor. Further, these individuals will consider the circumstances, as well as the past department of the involved student-athlete in rendering a final decision.

(CP 636) Importantly, the Handbook requires that a misdemeanor charge, such as Mr. Webb's, result in a review by the athletic director (Bill Moos) and sport supervisor (Mike Marlow) prior to the Mr. Leach handling the discipline. The Handbook also required Mr. Moos and Mr. Marlow's input and consideration of the circumstances prior to Mr. Leach rendering a final decision. Mr. Leach admitted during his deposition that the foregoing did

not occur.<sup>1</sup> Further, Mr. Leach admitted that he is not permitted to deviate from the Handbook as head football coach at WSU, but did not review the Handbook prior to cutting Mr. Webb from the football team because he “was pretty familiar with them [the rules].” (CP 632 - 633)<sup>2</sup>

On October 9, 2017, Mr. Webb was informed by Student Financial Services for WSU that his athletics grant would be cancelled as of January 1, 2018 and he had the right to request an appeal hearing. (CP 6; 638) The following day, October 10, 2017, Mr. Webb signed a Student-Athlete Appeal Petition form stating he was wrongly arrested for theft and requested a formal hearing. (CP 7; 640)

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<sup>1</sup> While the Declaration of Michael Leach submitted as support for Defendants’ Motion for Summary Judgment claims Mr. Leach consulted Mr. Moos and Mr. Marlow prior to cutting Mr. Webb (CP 213), Mr. Leach testified clearly and unequivocally at his deposition that he cut Mr. Webb immediately after being notified of Mr. Webb’s arrest. (CP 626)

<sup>2</sup> It is worth noting that WSU stated shoplifting would be considered a “low-level violation” – “In 2016, unless it was a first time drug or alcohol violation or a low, you know, like a low-level violation, like shoplifted some lipstick or something. . .” (CP 607)

3. **WSU Did Not Provide Mr. Webb Due Process During His Appeal Process.**

a. **The Appeal Board considered and relied upon unsworn, false representations of fact from Mr. Leach.**

In advance of the appeal hearing, Mr. Leach submitted a letter representing the purported reasons for dismissing Mr. Webb from the football team (“the Leach Letter”). The Leach Letter represented:

Our team rules are repeated regularly within the football program and there is no uncertainty where we stand in regarding upholding them. It is our consistent policy to dismiss any member of our football team that violates any of the following: (1) do not do drugs, (2) do not steal, (3) do not hit a woman, and (4) do not do anything to hurt the team.

...

A consistent standard needs to be maintained in dealing with the conduct of our players. Every 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 policies.

(CP 18) The Leach Letter was teeming with misrepresentations.

b. **Multiple football players committed “theft” and were not dismissed from the team.**

Mr. Leach represented to the Appeal Board that any member of the football team that “steals” would be automatically dismissed. Mr. Leach

even went so far as claiming during his deposition that he was not aware of any other football players that were caught stealing and were not dismissed immediately from the team. (CP 629-630) Such claims are wholly and patently false.

Drew Loftus, a member of the football team from 2012 through 2014 was arrested for stealing two bottles of tequila on February 2, 2013. (CP 588-589; 642-647) In fact, Mr. Loftus received three misdemeanor citations for third degree theft, a minor in possession and a minor intoxicated in public as a result of his theft of the tequila bottles. *Id.* Despite claiming Mr. Loftus was dismissed from the team for his violation of Mr. Leach's cardinal rule of "do not steal," WSU's own records show Mr. Loftus played as a redshirt junior and appeared in nine games during the 2014 season after his arrest. (CP 649-650)

Similarly, Logan Tago was a football player for WSU from 2015 to 2018. (CP 584-585) During the summer of 2016, Mr. Tago was arrested for an incident in which Mr. Tago was alleged to have punched another WSU student and stole his beer. (CP 585) Mr. Tago was charged with fourth-degree misdemeanor assault and felony second-degree robbery. (CP 585; 652-659) Mr. Tago ultimately reached a plea deal where the fourth-degree assault charged was dismissed and the second-degree felony robbery charge was reduced to a third-degree misdemeanor assault charge as a result

of the foregoing incident. *Id.* Mr. Tago was sentenced to 30 days in jail, 240 hours of community service and ordered to pay an \$800 fine. *Id.* Mr. Tago was permitted to play for the remainder of his collegiate eligibility. (CP 661-663)

c. **Multiple football players hit women or committed domestic violence against women and were not immediately cut from the team.**

Mr. Leach represented to the Appeal Committee that it was a “consistent policy” to dismiss any member of the team that hit a woman. In fact, Mr. Leach’s first team meeting in August 2017, he stated that “People who hit women are cowards. There is no room in football for cowards. No means no.” (CP 217) Contrary to those representations, however, Mr. Leach does not follow such rules and representations for WSU football.

Daquawn Brown was a member of the football team for at least two seasons and during the 2014 season. (CP 576-577) Mr. Brown was involved in an incident at a dance on March 1, 2014 in which he was arrested and eventually charged with second degree felony assault and fourth degree misdemeanor assault from allegedly hitting a male and a female in the face. (CP 578; 665-670) The incident involving Mr. Brown triggered an investigation by WSU’s Office for Equal Opportunity (“The OEO Investigation”). (CP 579)

The OEO Investigation found on a “more likely than not” standard based upon the “totality of the evidence” the following:

- On March 1, 2014, while the Complainant was engaged in a dance performance, the Respondent [Daquawn Brown] touched her buttocks approximately four times and made sexual gestures toward her. This conduct was unwelcomed, made the Complainant uncomfortable, and prompted others to intervene. The Respondent subjected the Complainant to this conduct on the basis of her sex or gender. (CP 580)
- The Complainant, Student A, and Student F told the Respondent to stop touching the Complainant. (CP 580)
- After being told to stop being disrespectful toward the Complainant, Student E attempted to intervene and calm the Respondent. The Respondent aggressively approached Student E and pushed him. Student E pushed the Respondent back. And the Respondent punched Student E. (CP 580-581)
- While people were pulling the Respondent and Student E apart the Respondent punched Student A [a female]. OEO finds insufficient evidence to determine whether or not the Respondent intended to punch Student A [a female]. (CP 581)
- The conduct and harm mentioned in Findings 9, 10, 13 and 14 above were all caused, either directly, or indirectly, by the Respondent having subjected the Complainant to conduct on the basis of her sex and/or gender. (CP 581)

Although the WSU Office for Equal Opportunity found specifically by a preponderance of evidence that Mr. Brown hit a woman, Mr. Brown

was permitted to play the entirety of the 2014 season. (CP 582-583) In fact, Mr. Brown appeared in all 12 games in Pac-12 Conference, started 11 and made all Pac-12 Honorable Mention. (CP 591)

Grant Porter was also a student-athlete on the WSU football team in 2017. (CP 586) In November 2017, Mr. Porter was arrested for domestic battery for an incident involving Mr. Porter's then-girlfriend. (CP 586) Mr. Porter was accused of assaulting his girlfriend after she refused to turn off a light. (CP 672-678) According to the court documents filed in the criminal matter, Porter also threatened to "put bullet holes in her door" and do something to her vehicle that would "blow up and kill her." (CP 672-678; 586-587) Mr. Porter also had previously choked the same individual twice and the individual's roommate noted that Mr. Porter had previously hit his girlfriend in the head. *Id.* Mr. Porter was not immediately placed on suspension nor cut from the team (unlike Mr. Webb). *Id.* Eventually, however, Mr. Porter was cut from the team, but not until the conclusion of the 2017 season. *Id.*

- d. **Mr. Leach and WSU admitted a violation of the rule of "don't do anything to hurt the team" does not automatically result in a player being cut from the team.**

Mr. Leach was asked during his deposition whether the Leach Letter was accurate or misleading when he represented that a violation of the

“don’t do anything to hurt the team” rule would result in an automatic dismissal. Mr. Leach admitted the Leach Letter was untrue in that regard:

Q: So if a player were to violate any of the foregoing - - four things - - don’t do drugs, do not steal, do not hit a woman, and do not do anything to hurt the team, they would be dismissed.

A: No. If they hurt the team, it will be addressed on a case-by-case basis. It depends what they did to hurt the team.

(CP 634) Astonishingly, Mr. Leach stated, yet again under oath, that there are only “three team rules that will lead to dismissal from the team if a player violates any one of them: (1) do not use drugs, (2) do not steal, and (3) do not hit women.” (CP 211) WSU also admitted during its CR 30(b)(6) deposition that a violation of “don’t do anything to hurt the team” does not result in an automatic dismissal from the team. (CP 590; 592)

Mr. Leach’s representations to the Appeal Board that “[o]ur team rules are repeated regularly within the football program and there is no uncertainty where we stand in regard to upholding them. It is our consistent policy to dismiss any member of our football team that violates any of the following: (1) do not do drugs, (2) do not steal, (3) do not hit a woman, and (4) do not do anything to hurt the team,” are completely untrue given the

actions of Mr. Leach and WSU after incidents involving Mr. Loftus, Mr. Tago, Mr. Brown and Mr. Porter.

Mr. Loftus clearly violated the “do not steal” rule, yet he was permitted to play after he committed theft. Similarly, Mr. Tago was arrested for **felony robbery** and pled guilty to a lesser charge in order to avoid a significant penalty. However, Mr. Tago was not only permitted to stay on the team, he was allowed to play prior to completing his community service in contravention of the Handbook. Likewise, Mr. Brown was found to have hit a woman and according to Mr. Leach’s own team speeches, was a “coward” that would be immediately kicked off the WSU football team. However, for reasons likely relating to his playing ability, was not kicked off the team for such an act. Grant Porter also committed a despicable act and pled guilty to battery against a woman, yet he was not immediately cut from the team. All of the foregoing incidents are uncontested, yet Mr. Leach represented to the Appeal Board that no such exceptions existed. Unfortunately, the Appeal Board relied on the erroneous and untrue Leach Letter to arrive at its ultimate conclusion. (CP 569)

**4. The Appeal Board Failed To Provide Mr. Webb Basic Due Process Protections Despite Being Acutely Aware Of The Requirement To Do So.**

Mr. Webb’s student-athlete financial aid appeal took place on November 1, 2017. (CP 7) The Appeal Board failed to provide Mr. Webb

with many basic due process protections as the hearing was conducted in the following manner:

- No testimony under oath. (CP 564-565)
- No procedure for introducing documents at the appeal hearing or allowing the opposing side to rebut, much less review documents introduced at the hearing. *Id.*
- Mr. Webb was not allowed to be present during the time the Athletic Department addressed the Appeal Board as he was required to present to the Appeal Board first then subsequently excused from the hearing. *Id.*
- Mr. Webb did not have an opportunity to cross-examine members of the Athletic Department. (CP 566)
- Mr. Webb did not have an opportunity to either listen or watch WSU's contentions or unsworn testimony during the hearing. *Id.*
- While the Appeals Board could ask both sides questions, such questions were not memorialized in any fashion and the hearing was not recorded, transcribed, written down or memorialized in any way. (CP 566-567)
- Mr. Leach was not present during the hearing, but his unsworn, untrue letter was relied upon in order for the Appeals Board to render its decision. (CP 568-569)

The Appeal Board was on notice such failure to provide basic due process during a student aid appeal hearing was contrary to an appellant's due process rights long before Mr. Webb's appeal hearing on November 1, 2017. Although WSU provided "significant procedural protections" for its Student Conduct Board hearings, it failed to preserve all documents – specifically questions posed the chair of the hearing to utilize as cross-examination material. (CP 609-615) Due to the foregoing failure, a lawsuit was filed against WSU, *Heredia v. WSU*, Whitman County Superior Court Case No. 16-2-00085-0, which resulted in the Student Conduct Board

changing its due process protections and procedures due to the lawsuit. *Id.* Despite the Student Conduct Board providing further due process protections during its hearings in 2016, the student financial aid hearings did not change its procedures nor provide many of the “significant procedural protections” offered by the Student Conduct Board.

The Appeal Board issued its decision later during the day on November 1, 2017. (CP 680) The Appeal Board denied Mr. Webb’s appeal and found the athletic department acted within the rules and regulations of canceling Mr. Webb’s athletic aid but did not provide the specific reasons for the decision. *Id.* The Appeal Board represented that “[t]he committee’s decision is final.” *Id.*

**5. After The Appeal Board Rubber Stamped Mr. Leach’s Actions, The Student Conduct Board Found Mr. Webb Was “Not Responsible” For Theft And The Whitman County Prosecuting Attorney’s Office Independently Dropped The Theft Charge.**

The WSU Office of Student Conduct investigated Mr. Webb’s Wal-Mart incident. On November 22, 2017, The WSU Office of Student Conduct issued a letter to Mr. Webb regarding alleged violations of the Standards of Conduct for Students (*Standards*):

At the outset of the hearing, I recorded your plea of *not responsible* for the alleged *Standards*. Based on the information available, including the contents of your conduct file, the following are my findings of

fact based on the preponderance of the evidence (more likely than not) standard:

...

On October 4, 2017, at approximately 9:52 p.m., in the Walmart retail store in Pullman, Washington, you and another student were went through the self-checkout line. While purchasing merchandise, the student you were with placed items in your cart which neither you , nor the student with you, paid for. You then left the store with approximately \$225.00 worth of merchandise that had not been paid for. You were subsequently arrested for theft by a Pullman police officer.

...

Regarding the October [ ]4, 2017 incident, while you were present during the incident, both your statement to the conduct officer, and the statement of the other student involved in the incident, support the assertion that you may not have been aware that the items in question were not being scanned.

. . . I am dropping the charges regarding the October 4, 2017 incident. . .

(CP 682-684) Similarly, the third-degree theft charge was dismissed by the Whitman County Prosecuting Attorney's Office on December 20, 2017 for lack of evidence. (CP 686-689)

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## **D. ARGUMENT**

### **1. Quasi-Judicial Immunity Does Not Apply.**

The trial court correctly found that the Appeals Board members violated Mr. Webb's due process rights based upon [*Conrad v. Univ. of Wash.*, 62 Wn. App. 664, 814 P.2d 1242 (1991)] which both parties agreed controlled the process due to Mr. Webb. The trial court also correctly recognized whether quasi-judicial immunity applied was governed by a various factor test first announced in *Taggart v. State*, 118 Wn.2d 195, 204-05, 822 P.2d 243 (1992). However, the trial court erred by failing to recognize the weight of the procedural safeguards factor and by justifying its application in order to encourage members to serve on the Appeals Board.

"Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions." *Lutheran Day Care v. Snohomish Cnty*, 119 Wn.2d 91, 99, 829 P.2d 746, 750 (1992). "Thus, quasi-judicial immunity is absolute." *Id.* "Absolute immunity necessarily leaves wronged claimants without a remedy." *Id.* at 105. "This runs contrary to the most fundamental precepts of our legal system." *Id.* "Therefore, in determining whether a particular

act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity.” *Id.*

Washington courts have formulated various tests for determining whether administrative action is functionally comparable to judicial action and therefore quasi judicial. In order to determine whether an administrative action is functionally comparable to judicial action, however, one must first define judicial action, a precise definition of which is probably neither possible nor desirable. Although the proceedings properly called “judicial” share similarities, no one attribute is essential to qualify an action as judicial, provided the action has enough other relevant attributes. Therefore whether a challenged administrative action is functionally comparable to judicial action depends on various factors, such as whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors.

*Taggart*, 118 Wn.2d at 205 (emphasis added).

The Court in *Lutheran Day Care* expounded upon the analysis announced in *Taggart*, “particularly in the discussion of relevant policy considerations” and reiterated that “*Taggart* should not be read as implying that in the absence of any form of procedural safeguards, other facts would be sufficient to justify quasi-judicial immunity.” *Lutheran Day Care*, 119

Wn.2d at 106. The “procedural safeguards . . . help to insure the correctness of officials’ decisions and therefore reduce the need for a damages action against that officer.” *Id.* at 108. Some of the safeguards include: “(1) the insulation of the judge from political influences, (2) the importance of precedent in resolving controversies, (3) the adversary nature of the process, and (4) the correctability of error on appeal.” *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 512, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978)).

There were no safeguards present to protect against errors as Mr. Webb was not permitted to cross-examine any witnesses nor was he allowed to hear the allegations and evidence against him and no witnesses were placed under oath. Furthermore, the Appeals Board incorrectly informed Mr. Webb their decision was final when in fact, Mr. Webb was entitled to further review based upon the Washington Administrative Code. The Washington Administrative Code Title 504 specifically addressing WSU provides that “[t]he following proceedings are matters to be treated as brief adjudications pursuant to RCW 34.05.482 through 34.05.491 . . . (5) Hearings on denial of financial aid. Any hearings required by state or federal law regarding granting, modification or denial of financial aid are brief adjudicative proceedings conducted by the office of student financial services.” WAC 504-04-010. According to Washington law controlling such brief adjudications:

(3) At the time any unfavorable action is taken the presiding officer shall serve upon each part a brief written statement of the reasons for the decision. Within ten days, the presiding officer shall give the parties a brief written statement of the reasons for the decision and information about any internal administrative review available.

(4) The brief written statement is an initial order. If no review is taken of the initial order as authorized by RCW 34.05.488 and 34.05.491, the initial order shall be the final order.

RCW 34.05.485.

Here, the Appeal Board's decision was considered an initial order and not a "final order" as represented by Defendants. Failing to inform and provide Mr. Webb of an opportunity to be heard is a clear violation of one of his hallmark due process rights. As such, no adequate procedural safeguards existed and quasi-judicial immunity does not apply.

Furthermore, the trial court erred by justifying its application of quasi-judicial immunity based upon its desire to protect the individual members, the "volunteers" of the Appeals Board:

I - - I suspect, I don't know for sure, but any time there's an administrative decision, there's a right to appeal to Superior Court. This wasn't under the - - well, this, arguably, wasn't under the APA, but it probably was because it was maybe a brief adjudicated hearing, but I'm - - I'm suspecting that, and I think there were

safeguards exist to protect against errors, whether that's by appeal<sup>3</sup> or by - - or by the - - the prudence, the experience, the commitment that the - - and the experience that - - and the - - -of these volunteer administrators who were simply volunteering to participate in the financial aid appeals process.

I think they would expect that they were acting as quasi-judicial officers and that they would probably expect that they would have quasi-judicial immunity, because who would want to volunteer and get sued over something that you did as a volunteer that you thought you were doing at least in the act of a quasi-judicial board.

So I'm going to rule that the State has - - that there's - - although there's materials issues of fact on the due process and to qualify that there is - - there is, the board did enjoy quasi-judicial immunity, so that's my ruling after further review.

(RP 106) "Quasi-judicial immunity and personal qualified immunity are designed to served different functions." *Savage v. State*, 127 Wn.2d 434, 441, 889 P.2d 1270 (1995). "Quasi-judicial immunity is designed to protect the government, not the individual employee, from suit." *Id.* "By contrast, personal qualified immunity . . . is intended to protect the individual from

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<sup>3</sup> It is undisputed Mr. Webb was told on multiple occasions the Appeals Board's decision was final and no appeal rights existed (CP 680).

the unduly inhibiting effect the fear of personal liability would have on the performance of his or her professional obligations.” *Id.* at 441-42.

Here, the trial court committed error by applying quasi-judicial immunity based upon its concern no volunteers would choose to serve on the Appeal Board if they were not granted absolute immunity. Accordingly, this Court should reverse the trial court’s determination quasi-judicial immunity is applicable.

**2. The Court Erred By Finding The Student Athlete Handbook Was Not A Bilateral Contract Nor Did It Obligate WSU.**

It is undisputed that WSU and Mr. Webb had a written contract – the Athletic Financial Aid Agreement – which incorporated by reference “academics policies or standards, athletics department or team rules or policies” one of which is the Handbook. (CP 757) It is also undisputed that Mr. Leach did not follow the Handbook’s required procedures when he dismissed Mr. Webb. (CP 741-742)

Despite the foregoing, the trial court dismissed Mr. Webb’s breach of contract claim reasoning that:

I think it’s a reasonable review of these documents to say that the student handbook is not a bilateral contract. It’s a student handbook that applies to the students, and it’s not a bilateral contract that’s obligated to WSU to follow. It’s for the students to

follow. It's operational guidelines, it's not an express contract.

I've listened to the recitation of the New Mexico case [] several times, and it sounds like it's right on the point to me, at least on the issues of whether the student handbook is part of the contract or not part of the contract. I find that it's not part of the contract, and it's - - form reviewing all of the documents that have been provided, I don't see there's a material issue of fact on the breach of contract.

(RP 65). In doing so, the trial court overlooked the dearth of case law in a strikingly similar context – the employment setting.

In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984), the Washington Supreme Court held that an employer may be bound by promises of specific treatment made in employee manuals or handbooks:

It would appear that employers expect, if not demand, that their employees abide by the policies expressed in manuals. This may create an atmosphere where employees justifiably rely on the expressed policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.

*Id.* at 230. Thus, the *Thompson* Court held:

[I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.

*Id.* According to the Restatement (Second) of Contracts, a “promise” is:

a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made.

*Restatement (Second) of Contracts § 2 (1981).*

Under the theory announced in *Thompson*, a claimant “must show (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was breached.” *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty*, 189 Wn.2d 516, 540, 404 P.3d 464, 477 (2017) (quotation omitted). “[W]hether an employment policy manual issued by an employer contains a promise of specific treatment in specific situations, whether the employee justifiably relied on the promise, and whether the

promise was breached are questions of fact.” *Id.* (quoting *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104-05, 864 P.2d 937 (1994)).

Here, the trial court did not weigh the factors in *Thompson*, but ruled without any substantive analysis that the Handbook did not obligate WSU despite the Handbook’s express language. Furthermore, the Washington State Supreme Court has instructed courts that whether representations contained in a handbook amount to an enforceable promise, i.e., contract, is a question of fact. The trial court clearly erred by refusing to recognize as much.

**3. Mr. Leach Tortiously Interfered With The Contract Between WSU And Mr. Webb.**

The trial court committed error by weighing the evidence and finding that Mr. Leach acted with an intent to benefit the WSU football team when he misrepresented facts in his letter to the Appeal Board:

And that case [*Conrad v. Univ. of Wash.*, 62 Wn. App. 664, 674, 814 P.2d 1242 (1991)] to me is binding on this case here, good faith means nothing more than an intent to benefit the corporation. Leach’s intent was to benefit his team by getting rid of a troubled player, by getting rid of a kind that wasn’t adhering to the rules, that wasn’t - - that got - - that culminated in getting busted for shoplifting, and shoplifting drug testing equipment and drug-masking equipment at that.

So I'm going to make that decision on that matter, that he was within - - acting within the scope of his authority and acting in good faith as defined by the Conrad case - - or Conard case.

(RP 117).

A tortious interference with a contractual relationship claim requires that the interferor be an intermeddling third party. *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978) *rev'd on other grounds*, 119 Wn.2d 519, 834 P.2d 17 (1992). A party to a contract cannot be held liable in tort for interference with that contract. *Houser*, 91 Wn.2d at 39. However, employees of a party can be third parties, but only if the employee acted outside the scope of his or her employment. *Id.* at 40. If an employee fails to act in good faith, that is, without an intent to benefit the employer, then the employee is acting beyond his or her scope of employment. *Conrad*, 62 Wn.2d at 675. "In applying scope of employment principles to intentional torts, however, it is accepted that it is less likely that a willful tort will properly be held to be in the course of employment . . ." *Burlington Indus. V. Ellerth*, 524 U.S. 742, 756, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

The trial court ultimately ruled Mr. Leach was acting in good faith and was merely "getting rid of a troubled player." (RP 117) However, Mr. Leach also claimed Mr. Webb was "worst" he's ever had in his coaching

experience, which objectively is false based upon the transgressions of other players thereby demonstrating his personal animus toward Mr. Webb. (CP 965-966) By finding Mr. Leach acting in good faith, the trial court erred as the courts' "job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002) (emphasis omitted). Here, the trial court substituted its role for that of the jury's and committed error by weighing the evidence. Furthermore, all facts in the record and their inferences must be viewed in a light most favorable to the nonmoving party, in this instance, Mr. Webb. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). By refusing to recognize Mr. Leach's potential personal animus, the trial court failed to properly apply the correct standard of summary judgment and committed reversible error.

#### **4. Defendants Owed Mr. Webb A Specific Duty Of Care.**

The trial court found the public duty doctrine applied and the negligence claim was therefore dismissed as a matter of law. (RP 143) However, the Court failed to recognize the duty to conduct the financial aid appeal hearing in a competent manner, in accordance with due process procedural protections and according to the Washington Administrative Code and Revised Code of Washington was not a duty owed to the public

in general – just to Mr. Webb. Furthermore, as a appellant during a student financial aid appeal, a special relationship existed between Mr. Webb and Defendants. Accordingly, the trial court erred by finding the public duty doctrine applicable.

Governmental entities are liable for damages arising out of their tortious conduct or the tortious conduct of their employees “to the same extent as if they were a private person or corporation.” *Cummins v. Lewis Cnty*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006) (quoting RCW 4.96.010(1)). However, when the defendant in a negligence action is a governmental entity, the plaintiff must show the duty breached was owed to him in particular and was not a breach of the duty owed to the public in general, which is referred to as the public duty doctrine. *Babcock v. Mason Cnty Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001).

The public duty doctrine is a "focusing tool" used to determine if the duty owed is to a "nebulous public" or to an individual. *Osborn v. Mason County*, 157 Wash.2d 18, 27, 134 P.3d 197 (2006) (citing *Taylor v. Stevens Cnty*, 111 Wash.2d 159, 166, 759 P.2d 447 (1988)). "The public duty doctrine 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. . . [a]nd its 'exceptions' indicate when a statutory or common law duty exists." *Osborn*, 157 Wash.2d at 28-9. "The question whether an exception

to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff." *Id.* at 29 (quoting *Taggart v. State*, 118 Wash.2d 195, 218, 822 P.2d 243 (1992)).

First, the duty of ensuring Mr. Webb was provided with due process during his Student Athlete Scholarship Appeal, an adjudicatory proceeding, was not owed to the public in general – it was owed to Mr. Webb solely. Thus, the “focusing tool” shows us WSU owed Mr. Webb a legal duty. Further, assuming *arguendo*, that the public duty doctrine is applicable, the special relationship exception applies. "A special relationship triggers an actionable duty where: (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give rise to justifiable reliance on the part of the plaintiff." *Honcoop v. State*, 111 Wash.2d 182, 192, 759 P.2d 1188 (1988) (citing *Taylor*, 111 Wash.2d 166). Here, there is no question the exception applies as Defendants were in direct privity with Mr. Webb and Defendants provided express assurances of due process protections were provided through WSU’s written policies, the Washington Administrative Code and the Revised Code of Washington. Mr. Webb relied upon these policies and trusted that Defendants would provide him an explanation and opportunity

to rebut the allegations against him. However, such an opportunity never occurred. Accordingly, the public duty doctrine is not applicable.

**E. CONCLUSION**

Based upon the foregoing Mr. Webb respectfully requests this Court reverse the trial court's order granting Defendants' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 22 day of November, 2019.



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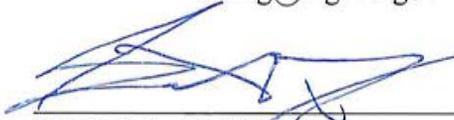
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