IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

___Medical Professional Liability Action (check if applicable)

Type of Pleading:
Brief in Support of Definitive Motion for Post-Trial Relief

Filed on Behalf of:
Defendant, The Pennsylvania State University

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BRIEF IN SUPPORT OF DEFINITIVE MOTION FOR POST-TRIAL RELIEF

Defendant The Pennsylvania State University submits this brief in support of its Definitive Motion for Post-Trial Relief, filed April 10, 2017.

PROCEDURAL HISTORY

Plaintiff Michael McQueary sued the University for (1) defamation; (2) intentional misrepresentation; and (3) violation of the Pennsylvania Whistleblower Law. The case was tried before the Honorable Thomas G. Gavin, specially presiding in the Centre County Court of Common Pleas. The defamation and misrepresentation claims were tried to jury from October 17, 2016, through October 27, 2016. On October 27, 2016, the jury returned a verdict in McQueary's favor, awarding him $1.15 million in compensatory damages on each claim and $5 million in punitive damages on the misrepresentation claim. Even though it was not yet due (because the Whistleblower Law claim remained pending), the University filed a motion for post-trial relief on November 7, 2016, which has been fully briefed.

The Whistleblower Law claim was submitted to the Court on the basis of the evidence received at the October 17-27 trial. The Court returned a verdict for McQueary on November 30, 2016, awarding him $3,974,048.00 for past and future economic loss and $1,000,000.00 for past and future non-economic loss. The Court ordered that post-trial motions would not be due until it decided McQueary's

petition for attorney's fees and costs. The Court decided that petition on March 30, 2017, awarding McQueary $1,663,016.00 in attorney fees; $15,000.00 for his "share of the Ticket City Bowl bonus" and $34,156.38 in other fees and costs. The University timely filed a Definitive Motion for Post-Trial Relief on April 10, 2016, which sought post-trial relief on the Whistleblower Law verdict and the award of attorney fees and also restated the University's grounds for post-trial relief on the misrepresentation and defamation claims.

The University submits this brief in support of its Definitive Motion for Post Trial Relief. Part I addresses the University's bases for post-trial relief on the non-jury verdict and the award of fees and costs. Part II restates the statement of issues and argument sections of the University's brief in support of its motion for post-trial relief on the misrepresentation and defamation claims, and is identical to those portions of the brief the University filed on February 6, 2017, in support of its initial motion for post-trial relief. The University is not re-attaching the exhibits that were attached to the February 6, 2017 brief, which were filed of record with the brief.

PART I

STATEMENT OF FACTS

In February 2001, McQueary entered the locker room at the University's Lasch Building. He testified that he heard a running shower and slapping noises. N.T. (10/21/16 (A.M.)) at 47:4-6. He also saw a reflection of Sandusky and a boy under a shower head with Sandusky's "arms wrapped around [the boy] in a severely inappropriate position." *Id.* at 47:4-15, 47:19-48:2. McQueary testified that he made some noise to make his presence known and left Sandusky and the child in the locker room. *Id.* at 47:19-48:2; N.T. (10/21/16 (P.M.)) at 170:14-170:25. McQueary consulted with his father and Dranov, a family friend, that night, and he reported the incident to Paterno the next day. *Id.* 169:16-170:17, 173:12-19.

According to McQueary, Paterno reported the incident to Curley, the athletic director, and Schultz, the senior vice-president of finance and business. N.T. (10/21/16 (A.M.)) at 54:12-21. Spanier testified that Curley and Schultz discussed the incident with him at a meeting on February 12, 2011, and by email through February 28, 2011. N.T. (10/20/16 (A.M.)) at 44:24-47:3. Curley and Schultz could not be questioned about the meeting because they invoked their Fifth Amendment rights due to criminal proceedings pending against them at the time of trial, which are now concluded. N.T. (10/25/16 (A.M.)) at 56:22-57:22.

According to McQueary, a week to ten days after that meeting Curley advised McQueary that the incident was reported to the Second Mile, that Sandusky would no longer be allowed to bring minors into the facility, and that the University was taking Sandusky's keys away. N.T. (10/21/16 (A.M.)) at 55:11-23.

There is no evidence that McQueary questioned the appropriateness of the University's actions over the next ten years or that he suffered any animus, retaliation, or adverse employment action during that time. *See id.*; N.T. (10/24/16 (A.M.)) at 97:5-10; (11/30/16 Op. at 52). Instead, he was promoted to assistant football coach (wide receivers) and recruiting coordinator. *See* Compl. ¶ 20; *see also* N.T. (10/21/16 (P.M.)) at 16:22-17:8.

In late 2010, McQueary began cooperating with an investigation by the Attorney General's Office into Sandusky's conduct. In December 2010, McQueary testified before the grand jury. In January 2011, Curley, Schultz, and Paterno testified before the grand jury. In April 2011, Spanier testified before the grand jury. In November 2011, the grand jury issued a presentment charging Sandusky with over 40 counts of sex crimes. Curley and Schultz were charged with perjury for their grand jury testimony. No adverse employment actions were taken against McQueary after the Board of Trustees were informed of the Grand Jury investigation in May 2011. (*See* 11/30/16 Op. at 52). To the contrary, the

University extended McQueary's fixed-term appointment when it came up for renewal on July 1, 2011. (*Id.*)

On November 5, 2011, Spanier released a statement of support for Curley and Schultz and allegedly made similar statements during meetings with the athletic department. *See* N.T. (10/20/16 (A.M.)) at 77:22-78:2; N.T. (10/20/16 (P.M.)) at 10:3-12:16.

After news broke of the presentment, the University received hateful and threatening messages directed against McQueary, including death threats. See below at 13-15. On November 11, 2011, McQueary was placed on paid administrative leave for safety reasons. *See* N.T. (10/21/16 (A.M.)) at 100:9-101:10; N.T. (10/19/16 (P.M.)) at 134:23-135:10.

Paterno and Spanier were dismissed shortly after the presentments became public. N.T. (10/17/16 (P.M.)) at 141:10-12. In January 2012, O'Brien was named head coach. He did not retain McQueary (or most of the other coaching staff), as he had his own complement of assistant coaches. N.T. (10/19/16 (P.M.)) at 147:5-15.[1] Accordingly, the University did not renew McQueary's fixed term appointment when it expired on June 30, 2012. N.T. (10/21/16 (P.M.)) at 90:22-91:1.

[1] *See Paterno v. The Pa. State Univ.*, No. 16-1720, slip op. at 2 (3d Cir. May 9, 2017) (noting that Coach O'Brien released Joseph "Jay" Paterno and William Kenney from their positions and they were fired in mid-January 2012).

STATEMENT OF QUESTIONS INVOLVED

1. Should the Court enter judgment in favor of the University on the Whistleblower Law claim notwithstanding the verdict where McQueary failed to prove that any adverse employment action he suffered was caused by his report of waste or wrongdoing?

2. Should the Court enter judgment in favor of the University on the Whistleblower Law claim notwithstanding the verdict where McQueary failed to rebut the University's showing that McQueary was placed on administrative leave and his fixed term appointment not renewed for legitimate reasons that were not pretextual?

3. Should the Court enter judgment in favor of the University on the Whistleblower Law claim notwithstanding the verdict or reduce the award on the Whistleblower Claim to nominal damages, where the damages awarded for the Whistleblower Law claim duplicate the damages awarded on the misrepresentation and defamation claims? In the alternative, should the Court order a new trial on all claims because the Court refused to provide special interrogatories to the jury, which would have allowed the Court to determine whether the jury's damage award on the misrepresentation and defamation claims is duplicative of the Court's damage award on the Whistleblower Law claim?

4. Should the Court vacate its award of damages on the Whistleblower Law claim to the extent it includes non-economic damages, because non-economic damages are not recoverable under the Whistleblower Law and are not supported by the evidence in this case?

5. Should the Court order a new trial where it erroneously (a) refused to stay the action pending the outcome of the criminal litigation against Curley, Schultz, and Spanier; (b) drew an adverse inference against the University based on its assertion of the attorney-client privilege; and (c) refused to permit the University to offer certain media accounts that cast McQueary in a negative light?

6. Should the Court vacate its award of counsel fees to the extent it awarded more than $202,619.50 in counsel fees because (a) the lodestar, not a private contingency agreement between McQueary and his lawyers, provides the proper basis for a fee award; and (b) the Court's award of attorney fees includes fees that were not reasonably related to his Whistleblower Law claim?

ARGUMENT

I. ARGUMENT IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON MCQUEARY'S WHISTLEBLOWER LAW CLAIM

A. STANDARD FOR JUDGMENT NOTWITHSTANDING THE VERDICT

"[T]here are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was

such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1170 (Pa. 1995).

B. MCQUEARY FAILED TO PROVE THAT THE UNIVERSITY VIOLATED THE WHISTLEBLOWER LAW.

(1) *A plaintiff must prove causation to establish a prima facie case for violation of the Whistleblower Law, and it is a defense that the plaintiff was discharged for a legitimate reason.*

The Whistleblower Law prohibits an employer from terminating or otherwise retaliating against an employee "because the employee . . . makes a good faith report or is about to report . . . to the employer or appropriate authority an instance of wrongdoing or waste by a public body or an instance of waste by any other employer as defined in [the Whistleblower Law]." 43 P.S. § 1423(a). The Court opined that McQueary needed only to "come forward with 'some evidence' of a connection between the report and retaliation." (11/30/16 Op. at 53). However, McQueary had the burden to "show by concrete facts or surrounding circumstances that the report [of wrongdoing or waste] led to [his] dismissal, such as that there was specific direction or information received not to file the report or [that] there would be adverse consequences because the report was filed." *Golaschevsky v. Dep't of Envtl. Prot.*, 720 A.2d 757, 759 (Pa. 1998) (quoting *Gray*

v. Hafer, 651 A.2d 221, 225 (Pa. Cmwlth. 1994), *aff'd per curiam*, 669 A.2d 335 (Pa. 1995)).

If an employee satisfies his burden of stating a prima facie case of violation of the Whistleblower Law, then "[t]he burden . . . shifts to the employer to establish that there was a legitimate reason for the adverse action." *Golaschevsky*, 720 A.2d at 760 (Nigro, J., concurring). "Once the employer offers such evidence, the burden shifts back to the employee to show that this reason was merely pretextual." *Id.*

(2) *McQueary failed to establish a causal connection between any report of wrongdoing and any adverse employment action.*

The University is entitled to judgment notwithstanding the verdict finding it not liable on McQueary's Whistleblower Law claim because McQueary failed to prove that his dismissal or other adverse action was caused by any report of wrongdoing that he made.

a. McQueary's February 2001 reports of the Sandusky incident did not, as a matter of law, cause him to suffer any adverse employment action.

The Court appears to have found that McQueary's initial report of the Sandusky incident to Paterno, Curley, and Schultz in February 2001 caused him to eventually suffer adverse employment action. (*See* 11/30/16 Op. at 52-53.) But it is not possible, as a matter of law, that McQueary's initial report in 2001 could have caused any adverse action in 2011.

Over ten years separated that initial report from McQueary's placement on administrative leave. He suffered no animus or retaliation during that period. The Court specifically found that "[w]hen Mr. McQueary initially reported what he saw . . . he suffered no disparate treatment or adverse employment consequences." (11/30/16 Op. at 52). He continued to suffer no consequences "[w]hen the Board of Trustees were informed of the Grand Jury investigation in May[] 2011." *Id.* When the University had the opportunity to not renew McQueary's fixed term appointment when it expired on July 1, 2011, it did not do so. *Id.* It was over ten years after McQueary's February 2001 reports, in November 2011, that McQueary was placed on administrative leave. That is fatal to his attempt to establish causation based on his February 2001 reports.

Adverse employment action that immediately follows a report of wrongdoing may suggest causation. On the other hand, when a longer period separates the events, the passage of time "has the opposite effect." *Cavicchia v. Phila. Hous. Auth.*, No. Civ.A. 03-0116, 2003 WL 22595210, at *11 (E.D. Pa. 2003), *aff'd,* 137 Fed. App'x 495 (3d Cir. 2005). "Absent evidence of intervening antagonism or retaliatory animus . . . the passage of time . . . is conclusive" against a finding of retaliation. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 504 (3d

Cir. 1997)[2]; *see also Callaghan v. Haverford Twp.*, 345 Fed. App'x 767, 771 (3d Cir. 2009) (plaintiff failed to establish causation under Pennsylvania Whistleblower Law where "a significant period of time (at least eleven months) lapsed between the alleged acts of whistleblowing and his termination"); *Johnson v. Resources for Human Development, Inc.*, 789 F. Supp. 2d 595, 602-03 (E.D. Pa. 2011) ("Plaintiff's unsupported suspicions are not enough to create an issue of material disputed fact regarding a termination that was almost five years after her report about a coworker."). Where even several months separate a report of wrongdoing from an adverse employment action, a plaintiff must show "intervening antagonism or retaliatory animus" to prove causation. *Golaschevsky*, 720 A.2d at 761-62.

As a matter of law, McQueary's initial reports of wrongdoing were not causally related to any adverse employment action against him over ten years later, where he continued to be employed by the University during that period while experiencing no retaliation or animus.

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[2] *Krouse* was a federal ADA case. *Krouse*, and other cases discussing federal Title VII claims and claims under the Pennsylvania Human Relations Act are instructive to interpret the Whistleblower Law. *See Golaschevsky*, 720 A.2d at 760-61 (Nigro, J., concurring) (citing cases).

b. McQueary failed to prove that any subsequent reports of wrongdoing caused him to suffer adverse employment action.

To the extent that the Court found that McQueary suffered adverse employment action because of any later reports of wrongdoing, including his cooperation with the Attorney General or testimony to the grand jury, there was insufficient evidence to support the Court's finding, or, in the alternative, it was against the weight of the evidence.

There is no evidence that anyone at the University decided to place McQueary on administrative leave or not renew his fixed term appointment because he cooperated with the Attorney General or testified before the grand jury. To the contrary, the Court found that "[w]hen the Board of Trustees were informed of the Grand Jury investigation in May, 2011 . . . no adverse employment actions were taken against Mr. McQueary . . . Neither was he subjected to any disparate treatment." (*See* 11/30/16 Op. at 52). The fact that McQueary was placed on administrative leave shortly after his cooperation became *publicly* known only shows that, as described below, the University's decision was motivated by safety concerns that followed from that public disclosure – not by animus arising from his cooperation with the attorney general or grand jury testimony. No two reasonable minds could disagree that the evidence at trial failed to establish a causal

connection between McQueary's cooperation with the grand jury and his administrative leave.

(3) *McQueary was placed on leave and dismissed for separate and legitimate reasons that were not pretextual.*

The University is also entitled to judgment notwithstanding the verdict on the Whistleblower Law claim because McQueary was placed on administrative leave and his fixed term appointment was not renewed because of separate and legitimate reasons that were not pretextual. It is a defense to a claim under the Whistleblower Law "that the action by the employer occurred for separate and legitimate reasons, which are not merely pretextual." 43 P.S. § 1424(c). The Whistleblower Law "envisions a shifting burden of proof." *Golaschevsky*, 720 A.2d at 760 (Nigro, J., concurring). "An employee is obligated to show that he reported wrongdoing before being subjected to adverse action." *Id.* "The burden then shifts to the employer to establish that there was a legitimate reason for the adverse action." *Id.* "Once the employer offers such evidence, *the burden shifts back to the employee to show that this reason was merely pretextual*." *Id.* (emphasis added).

The University established that there were legitimate, non-pretextual reasons both for its decision to place McQueary on administrative leave and for its later unrelated decision to not renew his fixed term appointment when it expired.

The decision to place McQueary on administrative leave was motivated by a desire to protect the safety of him and others. *See* N.T. (10/17/16 (P.M.)) at 32:19-20 (Ganter testifying that McQueary "became aware that there were death threats against his wife, his child, himself . . ."); N.T. (10/18 (A.M.)) at 68:25-69:4 (Mahon testifying that university switchboard "had received some threats related to the game"); *Id.* at 70:13-72:16 (Mahon discussing potential bomb threat and efforts to lock down stadium); N.T. (10/18/16 (P.M.)) at 89:1-3 (Baldwin testifying that Erickson decided to put McQueary on leave "because of all the threats that were being made on Mr. McQueary's life"); *Id.* at 95:14-17 (Baldwin testifying that police told her "there was no way that they could protect [McQueary] from threats that they had received."); *Id.* at 102:18-103:16, 117:8-10 (Baldwin testifying that threats to McQueary continued beyond the Nebraska game); *Id.* at 104-09 (Baldwin describing threats received by athletic office and testifying that "Dr. Erickson was very concerned about the threats on Mr. McQueary's life"); *Id.* at 138-39 (Baldwin discussing threats received by athletic department), *Id.* at 175:24-177:2 (Sherburne testifying that "[t]here were a lot of threats" and that security had been "beef[ed] up"); N.T. (10/19/16 (A.M.)) at 14:3-23 (Sherburne discussing threats against McQueary that were "disturbing, concerning" and "[l]ife threatening"); N.T. (10/19/16 (A.M.)) at 21-27 (Sherburne describing threats against McQueary and a bomb threat against the stadium); *Id.* at 65:6-13

(Sherburne testifying that threats against McQueary continued after he was placed on leave); N.T. (10/19/16 (P.M.)) at 23:20-24:1 (Runkle describing bomb scare at ticket office), *Id.* at 75:3-76:16 (Runkle describing emails received against McQueary and testifying that she was concerned for McQueary's safety); N.T. (10/20/16 (P.M.)) at 155:19-158:6 (McQueary describing email threats against himself); N.T. (10/21/16 (P.M.)) at 186:16-192:18, 200:16-24 (McQueary describing email threats he received).

The University decided to not renew McQueary's fixed-term appointment because O'Brien brought with him a full complement of assistant coaches. N.T. (10/19/16 (P.M.)) at 147:5-15 (Joyner testifying that "O'Brien had for a long time been planning on being a head coach, and being the organized person that he is he had his assistant coach roster pretty much set before he even showed up [at Penn State]"), *Id.* at 170:10-11 (Joyner testifying that McQueary's fixed term appointment was not renewed because "there was no work for him . . . and his term was expiring."); *see also* N.T. (10/17/16 (P.M.)) at 42:5-8; *Paterno v. The Pa. State Univ.*, No. 16-1720, slip op. at 2 (3d Cir. May 9, 2017).

Because the University satisfied its burden of identifying separate, legitimate, non-pretextual reasons for placing McQueary on administrative leave and not renewing his fixed term appointment, the burden shifted to McQueary to show that those reasons were pretextual. He did not satisfy that burden.

The Court found that the University's stated reasons were pretextual because Joyner did not review McQueary's personnel file before deciding not to renew his fixed term appointment and because McQueary had previously earned high performance ratings. (*See* 11/30/16 Op. at 50-51). However, Joyner did not need to review McQueary's personnel file to know that he was an assistant football coach and that there was no room for another assistant coach on the incoming coach's staff. There is no evidence that he took any steps to save the job of any of the other assistant coaches who were dismissed because there was no room for them on O'Brien's staff. Further, the Court found "Coach O'Brien credible when he said he would not have hired Mr. McQueary even if he had interviewed him as he already had a person for Mr. McQueary's position, Mr. Stan Hixson." (11/30/16 Op. at 51). This finding proves that the reason McQueary's fixed term appointment was not renewed was because there was no place for him on the incoming coaching staff.

The Court also found that the lack of room on O'Brien's coaching staff was not "a separate and legitimate reason for the termination of Mr. McQueary" because that circumstance was related to the University's dismissal of Paterno, which was in turn related to the grand jury presentment. (*See* 11/30/16 Op. at 51-52). But the University's decision to discharge Paterno was not done in retaliation for McQueary's report of wrongdoing, nor was McQueary directly injured by it.

To the extent that resulted in other personnel changes, that was separate from any report of wrongdoing that McQueary made. The Whistleblower Law does not provide McQueary any right to complain about the University's dismissal of Paterno.

Finally, it is irrelevant whether the University's decision to place McQueary on leave or to not renew his fixed term appointment (or, for that matter, to dismiss Paterno) was the best decision. "In order to discredit [an] employer's proffered reason . . . 'the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.'" *Cavicchia*, 2003 WL 22595210, at *9-10 (quoting *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997)). "The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [plaintiff's protected activity.]" *Cavicchia*, 2003 WL 22595210, at *10 (quoting *Keller*, 130 F.3d at 1108) (substitution in original).

Accordingly, all that is relevant is whether the decisions to place McQueary on leave and not renew his fixed term appointment were motivated by the reasons that the University claims. McQueary failed to prove that they were not.[3]

[3] The Court's November 30, 2016 order included irrelevant findings regarding the conduct of Curley, Schultz, and Spanier, including that they failed to report the incident to university police (11/30/16 Op. at 2); that they decided to take a

C. THE ONLY DAMAGES THE COURT AWARDED ON THE WHISTLEBLOWER CLAIM ARE DUPLICATIVE OF DAMAGES THAT THE JURY AWARDED ON THE MISREPRESENTATION AND DEFAMATION CLAIMS.

The University is entitled to judgment in its favor on the Whistleblower Claim, or, in the alternative, a reduction in the verdict to award only nominal damages to McQueary, because the only damages recoverable on the Whistleblower Claim are duplicative of damages that the jury already awarded McQueary on his misrepresentation and defamation claims. In the alternative, the University is entitled to a new trial on all claims because the Court improperly refused the University's request to provide special interrogatories to the jury.

A plaintiff may not recover duplicative damages for the same injury. *See* 22 Am. Jur. 2d Damages § 40 ("The law abhors duplicative recoveries . . . [F]or one injury, there should only be one recovery irrespective of the availability of multiple remedies and actions . . . [T]he plaintiff ultimately cannot recover twice for the

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"humanitarian" approach to Sandusky (*Id.*); that Curley and Schultz did not file reports with Centre County Youth Services, the Department of Public Welfare, or any police agency (*Id.* at 13); and Schultz's conversation with John McQueary and Jonathan Dranov (*Id.* 15, 20, 24). The conduct of Curley and Schultz was irrelevant to McQueary's Whistleblower Law claim, which was the only claim at issue in the Court's November 30, 2016 opinion. It did not address whether McQueary made a report of wrongdoing; whether he suffered any adverse action because of such a report; or whether he was placed on leave or terminated for other legitimate reasons. That error was compounded by the court's conclusion that a mandated reporter instruction was justified with respect to Curley and Schultz. *See* below at pages 44-54.

same wrong."); *see also id.* §§ 45, 800; *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 761 A.2d 553, 556 (Pa. Super. 2000) (quoting Restatement (Second) of Torts § 623(A) cmt. g and noting that claims can be brought for both defamation and injurious falsehood "so long as the damages are not duplicated."), *rev'd on other grounds*, 809 A.2d 243 (Pa. 2002); *Rossi v. State Farm Auto Ins. Co.*, 465 A.2d 8, 10 (Pa. Super. 1983) ("An injured party cannot recover twice for the same injury.")

The Court awarded damages to McQueary on his Whistleblower Law claim for economic damages including "past and future lost wages, and for the tax penalty incurred" when McQueary withdrew money from his retirement account. (11/30/16 Op. at 57). Under the Court's instructions to the jury on the defamation and misrepresentation claim, the jury was allowed to award duplicative damages. In particular, the jury was permitted to award damages to compensate McQueary for "the probable effect of the defendant's conduct had on the plaintiff's profession and the harm that he may have sustained in that profession as a result of the conduct of the [U]niversity." N.T. (10/27/16) at 141:23-142:2 (defamation), 152:24-25 (for misrepresentation "the damages analysis essentially is the same.") These are duplicative of the economic damages that the Court awarded on the Whistleblower Law claim.

The jury was also permitted to award damages on the defamation and misrepresentation claims for actual harm to McQueary's reputation, emotional distress, mental anguish and humiliation, and "any other special injuries." (11/30/16 Op. at 58; *see also* N.T. (10/27/16) at 140:2-12 (defamation), 153:5-14 (misrepresentation)). Those are duplicative of the non-economic damages the Court awarded on the Whistleblower Law claim for reputational damage and humiliation. (*See* 11/30/16 Op. at 58-62). The Court acknowledged that it has "no way of knowing what category of damages the jury's award addressed." (11/30/16 Op. at 58).

Contrary to the Court's assertion that "Penn State could have avoided" potential duplication of damages "by use of a simple jury interrogatory," (11/30/16 Op. at 58-59), the University did propose to provide the Court with special interrogatories, in addition to a sample verdict slip. N.T. (10/26/2016 (P.M.)) at 62:12-19. The Court instructed the University to submit a verdict slip without special interrogatories. *Id.* at 62:15-63:4. The court stated:

> You can submit [a proposed verdict slip] at 8:15 as long as you have a copy. But I mean, you know, did the Spanier statement defame Mr. McQueary? Yes or no. And depending on that, you get to answer a damage question and then same thing with the misrepresentation. I mean, I don't see it as rocket science and I'm not going to be going down each individual element, do you find this element, do you find that element, you know, I don't think we need to do that.

Id. at 62:20-63:4. The Court refused to entertain the proposed special interrogatories the University submitted the next day. *See* Aff. of George Morrison, attached as **Exhibit 1**.

In the alternative to judgment on the Whistleblower Law claim, the University is entitled to a new trial to the extent that the Court's refusal to provide special interrogatories prevents it from determining whether McQueary's damages on his Whistleblower Law claim duplicate his damages on his defamation and misrepresentation claims.

D. THE WHISTLEBLOWER LAW VERDICT SHOULD BE VACATED TO THE EXTENT IT INCLUDES NON-ECONOMIC DAMAGES.

(1) *Non-economic damages are not recoverable under the Whistleblower Law.*

In the alternative to a judgment finding the University not liable on the Whistleblower Law claim, or reducing damages on the Whistleblower Law claim to nominal damages only, the verdict should be reduced by $1 million because non-economic damages are not recoverable under the Whistleblower Law and because the award of non-economic damages was contrary to and not supported by the evidence.

The Court awarded McQueary $1 million in damages on the Whistleblower Law claim for non-economic loss including humiliation and damage to his reputation. (11/30/16 Op. at 58-62). Besides duplicating the damages that the jury

awarded McQueary on his defamation and misrepresentation claims, the Court's award of non-economic damages should be vacated because non-economic damages are not recoverable under the Whistleblower Law.

Section 5 of the Whistleblower Law, 43 P.S. § 1425, provides that a court may award "reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies." The Court held that it was authorized to award non-economic damages by the statute's reference to "actual damages." (*See* 11/30/16 Op. at 58).

Statutory language that authorizes the award of "actual damages" does not, standing alone, authorize a court to award damages to compensate purely non-economic harms, such as humiliation, emotional distress, or mental anguish. Where the General Assembly uses the rubric of "actual damages" to include non-economic damages, it makes that choice explicit. There are several statutes in which the General Assembly has specified that "actual damages" include damages for non-economic harm. *See* 42 Pa.C.S. § 8315 (providing that "actual damages" arising from identity theft include harm to reputation); 42 Pa.C.S. § 8316.1(c) (providing that "actual damages" for the unlawful dissemination of an intimate image include harm to reputation); Pennsylvania Human Relations Act, Act of Oct. 27, 1955, P.L. 744, as amended, § 9, 43 P.S.§ 959 (providing that the Pennsylvania

Human Relations Commission "may award actual damages, including damages caused by humiliation and embarrassment," for unlawful discrimination). The General Assembly included no such language in the Whistleblower Law.

If the term "actual damages" necessarily includes non-economic injury such as harm to reputation, humiliation, or embarrassment, there would be no reason for the General Assembly to call out these elements of damages in certain statutes. The Court must presume that the General Assembly intended the additional language in these statutes to have some effect. *See* 1 Pa.C.S. § 1922(2). Under the Court's interpretation, the language in these statutes is superfluous.

As a policy matter, it makes sense that the term "actual damages" does not, by default, include damages for entirely non-economic harm. While non-economic damages are often described as compensatory, they have essentially the same deterrent effect as punitive damages. *See D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966, 970 (Pa. 1981) (citing *Murray on Contracts* § 232 (1972) and *Dobbs on Remedies* § 12.4 (1973)). Where punitive damages are not authorized by a statute, as is the case with the Whistleblower Law, *see Feingold v. SEPTA*, 517 A.2d 1270, 1277 (Pa. 1986), courts should not presume that the legislature intended to authorize non-economic damages through a general term like "actual damages." *See D'Ambrosio*, 431 A.2d at 970 (citing *Dobbs on Remedies* § 12.4

(1973) for the proposition that "mental distress damages . . . should be denied in all those cases where punitive damages are denied").

The Court cited the Commonwealth Court's recent opinion in *Bailets v. Pennsylvania Turnpike Commission*, No. 265 MD 2009 (Pa. Cmwlth. Oct. 6, 2016), attached as **Exhibit 2**, currently on appeal to the Supreme Court. (*See* 11/30/16 Op. at 58). However, the Commonwealth Court in *Bailets* misapplied two decisions by the Supreme Court to reach the conclusion that non-economic damages are awardable under the Whistleblower Law. The first was *Joseph v. Scranton Times, L.P.*, 129 A.3d 404 (Pa. 2015), also cited by this Court, where the Supreme Court analyzed the injury that a plaintiff must show to recover for defamation. The Supreme Court held that "proof of actual injury to a private plaintiff's reputation is a prerequisite to the recovery of damages for other actual injuries, including mental and emotional injuries." *Id.* at 429.

Relying on *Joseph*, the Commonwealth Court in *Bailets* held that the Supreme Court had "made clear that actual damages include not only economic but non-economic injuries." *Bailets*, slip. op. at 21. However, *Joseph* does not stand for that proposition. The Supreme Court in *Joseph* did not interpret a statutory provision authorizing "actual damages"—or, for that matter, any other statutory provision relevant to this case. The issue before the Court in *Joseph* was whether a plaintiff is required to show harm to reputation in order to recover damages for

"actual injuries." The reasoning on that point is inapplicable to the Whistleblower Law claim in this case.

Moreover, the tort of defamation is, by its nature, uniquely focused on non-economic injury. Unlike a claim under the Whistleblower Law, "the protection of an individual's reputation is the very essence of a claim for defamation." *Joseph*, 129 A.3d at 430. In that context, it would make little sense for "actual injury" to exclude a non-economic harm to one's reputation. That consideration is inapplicable to McQueary's Whistleblower Law claim.

The Commonwealth Court in *Bailets* also relied on the Supreme Court's statement in *O'Rourke v. Commonwealth*, 778 A.2d 1194 (Pa. 2001), that the Whistleblower Law is a remedial measure intended to put the employee "in no worse a position for having exposed the wrongdoing." *Bailets*, slip. op. at 21-22. But that statement of policy does not stand in isolation. It must be read against the statutory language authorizing "actual damages," as well as the General Assembly's use of that language in other statutes. *O'Rourke* reached conclusions about the policy goals of the Whistleblower Law, but it did not address the statutory language at issue here. The decision is of limited value for resolving the question of statutory interpretation in this case.

This Court, and the Commonwealth Court in *Bailets*, focused on the policy considerations in *O'Rourke* to the exclusion of other critical policies underlying the

Whistleblower Law. One such policy is the avoidance of massive awards for hard-to-quantify non-economic harm such as mental anguish, emotional distress, and humiliation. If the General Assembly agrees with the policy objective cited by the Commonwealth Court in *Bailets*, and adopted by the Court in this case, then it can amend Section 5 of the Whistleblower Law to make clear that damages for non-economic harm are available to successful plaintiffs.

(2) *The award of non-economic damages in this case is not supported by sufficient evidence or, in the alternative, is against the weight of the evidence.*

Further, the amount of the award of non-economic damages is not supported by sufficient evidence, or, in the alternative, is against the weight of the evidence. Damages for non-economic harms "may not be arbitrary, speculative, or punitive, and must be reasonable." *Haines v. Raven Arms*, 640 A.2d 367, 370 (Pa. 1994). Where an award does not "bear a reasonable relationship to the plaintiff's pain and suffering," it must be reduced. *Id.*; *see also Stonehill Coll. v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 205, 225 (Mass. 2004) ("Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered."). The Court should vacate the Commonwealth Court's award of non-economic damages and reduce it to an amount supported by the record. *See Marinelli v. Montour R. Co.*, 420 A.2d 603, 611-12 (Pa. Super. 1980) (reducing damages award after a non-jury trial). McQueary did not produce

competent evidence of any mental emotional injury, including, for instance, that he was treated for emotional distress. Any award of non-economic damages is purely speculative.

Also, any damage to McQueary's reputation resulted from his own actions and inactions and not those of the University. As described below at pages 107 through 122, there was significant news coverage highly critical of McQueary based on his own failure to intervene when he found Sandusky molesting a young boy in the athletic department locker room. This coverage began before the University made any decision to place McQueary on leave or not renew his fixed term appointment. As described at pages 107-22, the court erred by not admitting evidence of this negative media coverage. But even based on the evidence that was admitted, it is clear that any damage to McQueary's reputation was due to his own actions or inactions and not those of the University.

Because the non-economic damages awarded in this case are punitive, arbitrary, and shock any sense of justice, the award cannot stand. *Haines*, 640 A.2d at 370; *see also Stonehill Coll.*, 808 N.E.2d at 225. The Court should vacate the award of non-economic damages and reduce it to an amount supported by the record.

II. MOTION FOR A NEW TRIAL

A. STANDARD FOR GRANTING A NEW TRIAL.

"There is a two-step process that a trial court must follow when responding to a request for new trial. First, the trial court must decide whether one or more mistakes occurred at trial . . . Second, if the trial court concludes that a mistake . . . occurred, it must determine whether the mistake was a sufficient basis for granting a new trial." *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1122 (Pa. 2000).

B. THE COURT ERRED IN REFUSING THE UNIVERSITY'S REQUESTS FOR A STAY PENDING THE OUTCOME OF THE CRIMINAL LITIGATION AGAINST CURLEY, SCHULTZ, AND SPANIER.

The University is entitled to a new trial on all claims because the Court abused its discretion in refusing to stay the proceedings pending the conclusion of Curley, Schultz, and Spanier's criminal trials. The University twice moved to stay the proceedings until the conclusion of Curley, Schultz, and Spanier's criminal trials. The first motion was filed on October 22, 2012. The second motion was filed on May 31, 2016, after Curley and Schultz asserted their Fifth Amendment rights to not testify in this case.

The Court erred in denying the stay for the reasons explained below at pages 78-95.

The testimony of Curley and Schultz was relevant to the University's defense of the Whistleblower Claim in addition to the University's defense of the

defamation and misrepresentation claims. The Whistleblower Claim raised factual questions relating to the February 2001 incident and subsequent communications between McQueary, Curley, and Schultz. The Court made findings regarding the communications between McQueary, Curley, and Schultz, as well as subsequent actions taken by Curley and Schultz, in its opinion on the Whistleblower Law claim.

Curley and Schultz recently entered into plea agreements, and the criminal trial against Spanier concluded on March 24, 2017. It would not have delayed the proceedings unduly to have stayed this case until then. The University is entitled to a new trial so that it can discover and introduce relevant testimony from Curley and Schultz.

The Court's refusal to stay the proceedings was compounded by its conclusion that an adverse inference was justified based on Curley and Schultz's decision to exercise their Fifth Amendment rights not to testify in this case. As described below at pages 95-102, the Court instructed the jury that it may take an adverse inference based upon the exercise by Curley and Schultz of their Fifth Amendment rights. The Court's belief that an adverse inference was justified likely influenced its findings of fact and conclusions of law on the Whistleblower Law Claim. Had the Court stayed this action pending the outcome of Curley and

Schultz's criminal trials, there would have been no basis for them to assert their Fifth Amendment rights, and no occasion for an adverse inference in this case.

The University further reserves its right to file a motion for post-trial relief based on after-discovered evidence based on evidence admitted in the Spanier trial as well as the guilty plea allocutions of Curley or Schultz.

C. THE COURT ERRED IN DRAWING AN ADVERSE INFERENCE AGAINST THE UNIVERSITY BASED ON ITS ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE.

The University is entitled to a new trial on all claims, including the Whistleblower Law claim, because the Court erroneously took an adverse inference against the University based on its assertion of attorney-client privilege.

The Court stated that it would take an adverse inference against the University when the University objected on the basis of privilege to questions asked of certain witnesses at trial. *See* N.T. (10/24/2016 (A.M)) at 139:11-18, 139:22-140:1; *see also* N.T. (10/17/2016 (P.M.)) at 121:13-15; 122:13-15; 123:13-17; 124:15-125:14.

The court erred in drawing an adverse inference based on the University's assertion of the attorney-client privilege. *See United States v. St. John*, 267 Fed. App'x 17, 22 (2d Cir. 2008); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344-45 (Fed. Cir. 2004) (citing cases); *In re Tudor Assocs, Ltd. II*, 20 F.3d 115, 120 (4th Cir. 1994).

The improper adverse inference likely affected the Court's factual findings and evaluation of the evidence. The University is entitled to a new trial. In the alternative, the University is entitled to have the Court reconsider its verdict on the Whistleblower Law claim without the effect of any adverse inference.

D. THE COURT ERRED BY REFUSING TO PERMIT THE UNIVERSITY TO OFFER MEDIA ACCOUNTS THAT CAST MCQUEARY IN A NEGATIVE LIGHT.

As described below at pages 107-22, the Court erred by refusing to permit the University to offer media accounts that cast McQueary in a negative light not because of any actions of the University or its agents, but instead because of McQueary's own failure to intervene when he encountered Sandusky molesting a young boy. The excluded evidence would have shown that any reputational harm suffered by McQueary was due to his own inaction.

The Court's error in excluding this evidence entitles the University to a new trial on McQueary's Whistleblower Law claim as well as on his defamation and misrepresentation claims. The damages that the Court awarded on the Whistleblower Law claim included reputational damages. (11/30/16 Op. at 60). Accordingly, the University was entitled to present relevant evidence to the Court that any damage to McQueary's reputation resulted from his own actions or inactions.

III. ARGUMENT IN SUPPORT OF MOTION TO VACATE AND MODIFY THE ORDER AWARDING MCQUEARY ATTORNEY'S FEES AND COSTS

In the alternative to entering judgment in favor of the University on the Whistleblower Law claim, the Court should vacate its March 30, 2017 order to the extent that it awards McQueary more than $202,619.50 in attorney's fees.

A. THE COURT ERRED IN BASING ITS FEE AWARD ON THE CONTINGENCY AGREEMENT BETWEEN MCQUEARY AND HIS LAWYERS INSTEAD OF THE LODESTAR.

In general, the "American Rule" provides that parties generally bear their own litigation costs. *See Mosaica Acad. Charter School v. Commonwealth.*, 813 A.2d 813, 822 (Pa. 2002). Where an exception to the American Rule applies, the "general rule" for "determining reasonable attorneys' fees under fee-shifting provisions in Pennsylvania is the lodestar approach, whereby the lodestar figure may be adjusted, in the discretion of the trial court, in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement." *Krebs v. United Ref. Co.*, 893 A.2d 776, 790-91 (Pa. Super. 2006) (quotation marks omitted); *see also Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 52-53 (Pa. 2011). A contingency fee agreement is "simply a factor to be considered by the trial court in determining the reasonableness of an award of attorneys' fees because it can aid in demonstrating an attorney's remunerative expectations." *Id.*

It follows from the reasoning in *Krebs* and other cases that a contingency fee agreement may not constitute the sole basis for an award of attorney's fees. For instance, the Commonwealth Court approvingly quoted the United States Supreme Court, which observed that "[s]hould a fee agreement provide less than a reasonable fee calculated [by the lodestar], the defendant should nevertheless be required to pay the higher amount. *The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way.*" *Commonwealth v. PBS Coals, Inc.*, 677 A.2d 868, 875 (Pa. Cmwlth. 1996) (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989)) (emphasis added).

Courts in other jurisdictions have reasoned similarly. "[U]nder all federal fee-shifting statutes, reasonable attorneys' fees [are] essentially calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. The product of this equation is known as the 'lodestar.'" *Krebs*, 893 A.2d 776, 790 (Pa. Super. 2006); *see also, e.g., Brytus v. Spang & Co.*, 203 F.3d 238, 242-43 (3d Cir. 2000). Similarly, the Texas Supreme Court has held that an award of attorney fees under a fee-shifting statute cannot be based solely on a contingency fee agreement because such an award "may be determined without regard to many of the factors that should be considered when determining reasonableness." *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812,

818 (Tex. 1997). It refused to agree "that the mere fact that a party and a lawyer have agreed to a contingent fee means that the fee arrangement is in and of itself reasonable for purposes of shifting that fee to the defendant." *Id.* at 818; *see also Lubbock Cnty. v. Strube*, 953 S.W.2d 847, 857-58 (Tex. App. – Austin 1997) (following *Arthur Anderson* in a whistleblower case).

The Whistleblower Law includes "reasonable" attorney fees among "costs" and does not authorize any fee award exceeding those "costs." *See* 43 P.S. § 1425. Basing a fee award on a contingency fee agreement and not the actual hours worked violates Section 1425. There is no reason to believe that a contingent fee agreement entered into at the beginning of a case reflects a "reasonable" fee. By contrast, the lodestar necessarily reflects a lawyer's actual investment of time. The lodestar provides a starting point for determining a reasonable fee in a way that a contingency agreement cannot. Accordingly, the Court erred by basing its fee award on the contingency fee agreement between McQueary and his lawyers instead of the lodestar.

B. THE COURT ERRED IN AWARDING MCQUEARY FEES FOR WORK NOT RELATED TO HIS WHISTLEBLOWER LAW CLAIM.

The only one of McQueary's claims that is subject to fee-shifting is his Whistleblower Law claim. 43 Pa.C.S. § 1425 provides only for recovery of the "costs of litigation" incurred "in an action brought under this act." The

Whistleblower Law affords the Court no discretion to award McQueary fees on his defamation and misrepresentation claims, nor does any other rule or statute give the Court such discretion.

Where only one of a plaintiff's claims is subject to fee-shifting, attorney's fees are recoverable only to the extent they relate to that claim. *See, e.g., Klipper Constr. Assocos. v. Warwick Twp. Water & Sewer Auth.*, 105 A.3d 856, 2014 Pa. Commw. Unpub. LEXIS 718, at *35-*39 (Pa. Cmwlth. 2014); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1031-32 (Pa. Super. 2005).

In his fee petition, McQueary claimed to seek only fees related to his Whistleblower Law claim. However, the contemporaneous time sheets that his counsel produced include numerous entries representing time for work on McQueary's other two claims, or time that cannot be allocated to the Whistleblower Law claim because it is documented in mixed time entries that do not allocate time to specific claims. The time entries that McQueary's lawyers submitted include also include time spent on legal work unrelated to any of his claims and entries that are so vague that it is impossible to determine what they relate to. None of these fees are recoverable.

In its answer to McQueary's fee petition, the University identified six categories of claimed attorney's fees that McQueary cannot recover:

- Fees relating to the defamation claim;

- Fees relating to the misrepresentation claim;
- Fees relating to causes of action tried to a jury;
- Fees incurred for legal work unrelated to any of the causes of action in this lawsuit;
- Fees incurred for work that is so vaguely documented that it cannot be determined whether it related to the Whistleblower Law claim; and
- Fees documented only by "block billed" time entries that combine work related to the Whistleblower Law claim and McQueary's other claims. (It is only reasonable to shift, at most, one-third of those expenses to the University.)

The University's response to McQueary's timesheets, attached here as **Exhibit 3**, shows that after excluding the categories of fees above, McQueary has documented only $202,619.50 in attorney's fees that are arguably reasonable and related to his Whistleblower Claim. In particular, the amount of fees that are not recoverable, broken down by category, are:

	Strokoff Time Sheets	**Fleming Time Sheets**
Defamation-related entries	$36,631	$2,502.50
Misrep.-related entries	$8,157	$1,925
Jury Trial issue-related entries	$34,718	$7,507.50
Vague entries	$19,428.50	$19,800
Unrelated issues	$22,280.50	$2,392.50

Mixed Entry (REDUCE BY 66.6%)	[$312,986 x .66666 =] $208,655	[$93,692.50 x .66666] $62,461
SUB-TOTALS:	$329,880.00	$96,588.50
TOTAL:	**$426,468.50**	

Accordingly, only $161,708 may be awarded for Mr. Strokoff's office's time, which represents $491,588 (1740.15 hours at varying rates) documented in his timesheets, less $329,880 that cannot be recovered because it falls within the categories above. Only $40,911.50 may be awarded for Mr. Fleming's time, which represents $137,500 (500 hours at $275.00/hour) documented in his timesheets, less $96,588.50 that cannot be recovered because it falls within the categories above. Accordingly, the March 30, 2017 order should be vacated to the extent it awards more than $202,619.50 in counsel fees to McQueary.

WHEREFORE, the University requests that the Court enter judgment in its favor on the Whistleblower Law Claim, or, in the alternative, award McQueary only nominal damages on that claim. In the alternative, the University requests that the verdict on the Whistleblower Law be reduced by $1 million, representing non-economic damages not recoverable under the Whistleblower Law. To the extent that the Court does not enter judgment in favor of the University on the Whistleblower Law claim, the University requests that the award of attorney's fees and costs be reduced to no more than $202,619.50.

PART II

The University restates the statement of issues and legal argument sections from the brief it filed on February 6, 2017 in support of its initial motion for post-trial relief. The University is not re-attaching the exhibits that were attached to the February 6, 2017 brief, which were filed of record with the brief.

ISSUES PRESENTED

(1). Is the University entitled to judgment notwithstanding the verdict on Plaintiff's claims of misrepresentation and defamation, or, alternatively a new trial when the Court erroneously instructed the jury that Curley, Schultz, and Spanier were mandated reporters of child abuse when no evidence was presented during trial to establish that they were mandated reporters?

Suggested Answer: Yes.

(2). Is the University entitled to judgment notwithstanding the verdict on Plaintiff's claim of misrepresentation or, alternatively a new trial, when Plaintiff failed to provide sufficient evidence to establish each necessary element of intentional misrepresentation?

Suggested Answer: Yes.

(3). Is the University entitled to judgment notwithstanding the verdict when Plaintiff filed his misrepresentation claim outside the statute of limitations.

Suggested Answer: Yes.

(4) Is the University entitled to judgment notwithstanding the verdict, or, alternatively a new trial on Plaintiff's claim of defamation when Plaintiff based his claim on an expression of opinion that implied no undisclosed facts about Plaintiff?

Suggested Answer: Yes.

(5). Is the University entitled to judgment notwithstanding the verdict, new trial, new trial on damages, remittitur, or molding of damages when the compensatory award was not supported by the evidence?

Suggested Answer: Yes.

(6). Is the University entitled to judgment notwithstanding the verdict or remittitur on the punitive damage award for the misrepresentation claim when no evidence of malice, vindictiveness, or wholly wanton conduct sufficient to support an award of punitive damages was presented during trial?

Suggested Answer: Yes.

(7). Is the University entitled to a new trial on Plaintiff's claims of defamation and misrepresentation when its stay request were denied which required the University to prepare for trial and participate in trial without access to two key witnesses who were asserting their Fifth Amendment Rights?

Suggested Answer: Yes.

(8). Is the University entitled to a new trial on Plaintiff's claims of defamation and misrepresentation when the Court erroneously instructed the jury that it might take an adverse inference against the University for the decision of non-parties to exercise their Fifth Amendment rights?

Suggested Answer: Yes.

(9). Is the University entitled to a new trial when Plaintiff did not show actual malice and the Court failed to instruct the jury that it had to find actual malice since Plaintiff was a public figure or a limited-purpose public figure?

Suggested Answer: Yes.

(10). Is the University entitled to a new trial when Plaintiff did not show actual malice and the Court failed to instruct the jury that it had to find actual malice since Spanier's statement of opinion involved a matter of public concern?

Suggested Answer: Yes.

(11). Is the University entitled to a new trial on the defamation claim when the Court refused to permit the University to publish to the jury news articles that cast Plaintiff in a negative light for reasons independent of Spanier's statement?

Suggested Answer: Yes.

(12). Is the University entitled to a new trial on the defamation and misrepresentation claims when the Court improperly threatened to take an adverse

inference against the University each time a University witness asserted attorney-client privilege?

Suggested Answer: Yes.

(13). Is the University entitled to a new trial on the defamation and misrepresentation claim because the Court improperly refused to provide special interrogatories to the jury?

Suggested Answer: Yes.

(14). Is the University entitled to a new trial on the defamation and misrepresentation claims because the Court improperly acted as an advocate for the Plaintiff?

Suggested Answer: Yes.

STANDARDS OF REVIEW

Post-trial motions play an important role in the adjudicative process. "Such post trial reflection and consideration is . . . framed to give the trial judge an opportunity to review, research, and correct the numerous difficult impromptu trial decisions before they are submitted for review on appeal." Lee v. Southeastern Pa. Transp. Auth., 704 A.2d 180, 183 (Pa. Cmwlth. 1997). The University seeks judgment notwithstanding the verdict or, in the alternative, a new trial. Alternatively, the University seeks molding of the compensatory awards and remitting of the punitive damage award.

I. STANDARD FOR JUDGMENT NOTWITHSTANDING VERDICT (JNOV)

There are two bases upon which a trial court may award judgment notwithstanding the verdict. "[O]ne, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Campo v. St. Luke's Hosp., 755 A.2d 20, 23 (Pa. Super. 2000). "With the first, the court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure." Id.

II. STANDARD FOR A NEW TRIAL

Trial courts have broad discretion to grant or deny a new trial. Harman v. Borah, 756 A.2d 1116, 1121-22 (Pa. 2000). "The grant of a new trial is an effective instrumentality for seeking and achieving justice in those instances where the original trial, because of taint, unfairness or error, produces something other than a just and fair result, which, after all, is the primary goal of all legal proceedings." Id. at 1121 (quoting Dornon v. McCarthy, 195 A.2d 520, 522 (Pa. 1963). A new trial is appropriate when, as here, the trial court "committed an error of law that controlled the outcome of the case or committed an abuse of

discretion." Duncan v. Mercy Catholic Med. Ctr. of Southeastern Pa., 813 A.2d 6, 10-12 (Pa. Super. 2002), appeal denied, 573 Pa. 716, 828 A.2d 350 (2003).

III. REMITTITUR

It is the responsibility of the judiciary to keep jury awards within reasonable bounds. Haines v. Raven Arms, 640 A.2d 367, 370 (Pa. 1994), as supplemented, 652 A.2d 1280 (1995). A trial court should grant a request for remittitur "when a verdict that is supported by evidence suggests that a jury was guided by partiality, prejudice, mistake or corruption." See Sprague v. Walter, 656 A.2d 890, 924 (Pa. Super. 1995). The trial court must determine whether the award of damages "falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." Haines, 640 A.2d at 369.

IV. MOLDING THE VERDICT

A trial court has the power to mold a jury's verdict to conform to the clear intent of the jury. Groh v. Philadelphia Electric Co., 271 A.2d 265, 270 (Pa. 1970). "[T]he power to mold or more precisely amend a jury's verdict is merely a power to make the record accord with the facts, or to cause the verdict to speak the truth and not a power to enable a judge to invade the province of the jury." House of Pasta, Inc. v. Mayo, 449 A.2d 697, 702 (Pa. 1982) (citations omitted).

LEGAL ANALYSIS

I. MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

A. THE COURT PREJUDICED THE UNIVERSITY WHEN IT ERRONEOUSLY FOUND AS A MATTER OF LAW THAT CURLEY, SCHULTZ, AND SPANIER WERE MANDATED REPORTERS UNDER PENNSYLVANIA LAW

At trial, the Court raised *sua sponte* the issue of whether Pennsylvania law required Spanier, Curley, and Schultz to report McQueary's observations to the proper authorities. McQueary never pleaded that these men were mandated reporters. See generally Complaint (Ex. B). McQueary never raised this issue at trial. See generally N.T. (10/17/2016 – 10/27/2016).

During a hearing on jury instructions, the Court informed the parties that it would instruct the jury that "if the jury finds as a fact that Mr. McQueary told Mr. Curley that what he observed was sexual in nature and that Mr. Curley repeated that to Schultz and Spanier, that [sic] all three of those persons are mandated reporters." N.T. (10/27/2016) at 6:4-9. The Court found this position supported by an email chain between Curley, Schultz, and Spanier where Spanier claimed they could be "vulnerable for not having reported it." Id. at 6:10-16; Plaintiff's Exhibit 10 (Ex. G). This instruction was erroneous and essentially sealed the University's fate as to all claims. As the Court recognized, "I don't know how the defense can take the position he told them something else [other than the acts were sexual in

nature] when Dr. Spanier is indicating they are vulnerable to [sic] not having reported it...." N.T. (10/27/2016) at 6:21-25.

The University argued that Curley, Schultz, and Spanier did not come into contact with children in their profession so the record failed to support that they were mandated reporters under the statute. See id. at 7:20-25; 8:2-5. The University also objected by explaining that one could interpret Spanier's comment in several ways. See id. at 7:4-19. The Court nonetheless found that it could take "judicial notice of the law and define the law." Id. at 9:13-14. See also N.T. (10/27/2016) at 156:2-4 (restating objection).

The Court instructed the jury that if McQueary reported to Curley or Schultz that the conduct he observed was sexual, either Curley or Schultz was required to report McQueary's observations to the Department of Public Welfare or Children and Youth Services. The instruction read as follows:

> Now, if you find as fact, and I'm not suggesting it, but if you find as fact that Mr. McQueary reported to Mr. Curley that the conduct he observed between Mr. Sandusky and the boy in the shower that night was of a sexual nature, I tell you as a matter of law that Mr. Curley was a mandated reporter and was required to report that to the police and either the Department of Public Welfare or Children and Youth Services, whatever was the appropriate agency at that point in time, and that when – and again, if you find, and I'm not suggesting you find it – but if you find that Mr. McQueary was told by Mr. Curley and/or Mr. Schultz that appropriate action would be taken, and at the time they made that statement, that was a false statement and that Mr. McQueary relied

> upon that and that Mr. McQueary has subsequently suffered harm, then Mr. McQueary would be entitled to prevail on the misrepresentation claim. If you find that Mr. Curley told Mr. Schultz and/or told Dr. Spanier what it is that Mr. McQueary says he told Mr. Curley – in other words, it was conduct of a sexual nature – Mr. Schultz and Dr. Spanier were also mandated reporters, and they were required to report it to the police and/or the appropriate agency, DPW or Children and Youth Services.

N.T. (10/27/2016) at 148:20-149:23. When the jury asked for a clarification on the misrepresentation claim, the Court reiterated its view that Curley and Schultz were mandated reporters:

> [I]f you find as a fact that Mr. McQueary told Mr. Curley and/or Mr. Schultz and neither one of them told Dr. Spanier that the conduct he observed was one of a sexual in nature, that [sic] they are mandated reporters and appropriate action and proper investigation would include reporting it to the police and DPW or Child and Youth Services, the appropriate agency.

Id. at 178:2-10. The court's clarification was different from its first instruction, and neither the instruction nor clarification was consistent with the law in place in 2001, the time McQueary testified he reported Sandusky's conduct to Curley and Schultz. No mention is made in the clarification that McQueary was required to characterize the events he observed as sexual in nature. Rather, the Court stated only Curley and Schultz were mandated reporters if they did not tell Spanier that McQueary reported activities that were sexual in nature. Both versions of the

instructions were erroneous and the change itself was prejudicial as it likely led to jury confusion.

In 2001, when McQueary reported his observation to the University, Pennsylvania law contained a mandated reporter provision, which was codified in the Child Protective Services Law. See 23 Pa.C.S. § 6301, *et seq.* The mandated reporter provision required "persons who, in the course of their employment, occupation, or practice of their profession, come into contact with children shall report or cause to be made . . . when they have reasonable cause to suspect . . . that a child coming before them in their profession or official capacity is an abused child." 23 Pa.C.S. §6311 (2001). No evidence showed that either Curley, or Schultz, or Spanier qualified as a mandated reporter under the 2001 version of the law. Specifically, no evidence was presented that they (1) came into contact with children as part of their profession; or, (2) that an abused child come before them in their professional or official capacity.

The 2001 version of the statute listed several professions whose practitioners were considered mandated reporters. Those professions included "school administrator." 23 Pa.C.S. § 6311(B) (2001). The inclusion of "school administrator" in that list may have mistakenly persuaded the Court that Spanier, Schultz, and Curley were mandated reporters as the Court quickly interjected "and school administrator" when the University's counsel was arguing that the record

did not support they were mandated reporters. N.T. (10/27/2016) at 8:1. However, an analysis of the 2001 version of the statute makes clear that "school administrator" did not include university administrators.

While the statute referred to school administrators, the 2001 version of the law did not define school. See 23 Pa.C.S. at §§ 6303, 6311. Nothing suggests that the definition of "school" refers to postsecondary institutions such as the University. First, minors do not often matriculate at postsecondary schools. Further, the term "school administrator" was followed by "school teacher" and "school nurse" both terms regularly used in primary and secondary education, but not postsecondary education. See 23 Pa.C.S. at § 6311. Notably, the list of professions set forth in Section 6311 does not include professors, deans, provosts, teaching assistants, or resident assistants, occupational terms more common to a University setting. Here, there was no record evidence provided to show that Curley, Schultz, or Spanier met this definition or fell within any of the professions on the list.

The "plain language" of section 6311 "covers members of those professions who regularly meet with children." See Caswell v. BJ's Wholesale Co., 5 F. Supp. 2d 312, 317 (E.D. Pa. 1998) (emphasis added). This interpretation is "borne out by § 6311(b) which lists, as examples of persons required to report[:] doctors, nurses, clergy members, teachers, police, and social workers." Id. This statute's list of

professions includes only professions who come into regular contact with children. While University administrators may occasionally come into contact with a minor, they do not do so on a regular basis so as to make them mandated reporters under the 2001 version of the law. Id. (holding that photo lab technicians do not come into regular enough contact with children to be mandated reporters). Unlike those professions, again here, the trial record did not establish that Curley, Schultz, or Spanier came into regular contact with children.[4]

Even if the first element is met, the second unmet requirement is that, before any mandatory reporting requirement is triggered, an abused child must come before Curley, Spanier, or Schultz in order to trigger the reporting requirements. No evidence was presented that this occurred.

In Fewell v. Besner, 664 A.2d 577 (Pa. Super. 1995), the Superior Court considered whether a doctor who learned of but never came into contact with an abused child must report the abuse. Id. at 579. The Superior Court found the

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[4] Governor Thomas Corbett and the legislative leaders of the General Assembly in light of the Sandusky investigation created a task force to review the mandated reporter statute. See JOINT STATE GOV'T COMM'N REPORT OF THE TASK FORCE ON CHILD PROTECTION (Ex. H) at pp. 10, 33. The task force recommended that the statute be expanded to define school "to include public and private colleges and universities, community colleges and other post-secondary institutions where children may be involved in programs, activities or services." See id. at p. 33. See also id. at p. 59 (providing text of proposed definition of "school"). If the 2001 version included postsecondary education the statute's amendment would not have been necessary.

doctor did not have a reporting obligation because "[t]he plain language of . . . section [6311] makes it clear that only those who come into contact with abused children are required to report incidents of abuse." See id.

Two years later, the Superior Court reached the same result after considering a different fact pattern. In that case, a Big Brothers chapter learned that one of its big brothers, Randall Cassel, had sexually abused a little brother. See J.E.J. v. Tri-County Big Brothers/Big Sisters, 692 A.2d 582 (Pa. Super. 1997). Big Brothers suspended Cassel, but did not report him to authorities. Id. Two years later, Cassel abused another child who was not involved with the Big Brothers program. Id. The Court held that the second child could not hold Big Brothers liable for failing to report the first incident. The court reasoned that "[w]hile the statute was clearly promulgated for the protection of children, it appears that the children the statute aims to protect must be in some way connected to the persons who, in the course of their employment, come into contact with abused children." Id. at 586.

That did not occur there. Here, in addition to the fact that no evidence supported that they fell into the statute's definition for mandatory reporter, no evidence was presented that linked the child with Sandusky to Curley, Schultz, or Spanier. As such, the Court erred when it found that Curley, Schultz, or Spanier qualified as mandated reporters.

The proof of prejudice is manifest on the intentional misrepresentation claim. The Court instructed the jury that all it needed to find was that McQueary reported that the conduct in the shower was of a sexual nature and the University was automatically liable for intentional misrepresentation because Curley and Schultz were mandated reporters. Based on the evidence, the jury was then locked into finding the University liable for intentional misrepresentation.

While McQueary did not testify that he used the word "sexual" with Curley and Schultz, he did testify that he used the word with his direct supervisor, Joe Paterno. See N.T. (10/21/2016 (P.M.)) at 167:7-167:11. He further told the jury what he saw and heard. He heard slapping noises while the shower was running and a reflection of Sandusky and boy under a showerhead with Sandusky's "arms wrapped around him in a severely inappropriate position." See N.T. (10/21/2016 (A.M.)) at 47:4-15; 47:19-48:2. Further still, the jury was told that the criminal presentment charged Curley with making a false statement when he testified to the grand jury that "he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers." See N.T. (10/24/2016 (P.M.)) at 51:1:10; see also id. at 52:19-23. McQueary further testified that he told Curley and Schultz "what I had seen." Id.

Based on the testimony and other evidence presented to the jury, no jury would find that McQueary did not report sexual activity to Curley and Schultz.

This is especially true when the Court's denial of the stay motions had the effect of depriving the jury of the testimony of Curley and Schultz who were exerting their rights under the Fifth Amendment. Therefore, the Court put the rabbit in the hat by erroneously instructing the jury that all that was needed to establish a duty to report and make out an intentional misrepresentation claim was a report of conduct of a sexual nature. Because the Court was wrong about the law, the jury's verdict was tainted and must be vacated.

The same goes for the defamation claim. The Court's erroneous instruction undercut any defamation defense the University could present. The basis of the defamation claim was Spanier's statement that he had confidence that the record would show that Curley and Schultz acted professionally and appropriately. Self-evidently, if Spanier knew that Curley and Spanier were mandated reporters, but did not report McQueary's observations, his support would be merely feigned, leading the jury to find that Spanier knowingly made a false statement. As a result, the erroneous mandated reporter instruction fundamentally prejudiced the University's defamation defense.

The prejudice is also amplified because the Court refused to issue a stay that would have permitted Curley and Schultz to testify at the conclusion of their criminal proceedings. The prejudice was further amplified by the Court's instruction to the jury that Curley and Schultz's failure to testify justified an

adverse inference against the University. That adverse inference bolstered the mistaken conclusion that the record showed that Curley and Schultz were mandated reporters who failed in fulfilling their obligations.

The Court should not have instructed the jury that Curley, Schultz, and Spanier were mandated reporters. Indeed, the Court directly used the mandated reporter status to bolster the misrepresentation claim. Judgment notwithstanding the verdict is appropriate because without the mistaken instruction on Curley's, Spanier's, and Schultz's status as mandated reporters there is no evidence to support the misrepresentation claim. Similarly, judgmcnt notwithstanding the verdict is appropriate for the defamation claim, which also concerns the adequacy of the actions taken by Curley and Schultz.

Additionally, an erroneous jury instruction will be deemed sufficient to result in a new trial when "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue." Lewis v. CRC Ind., Inc., 7 A. 3d 841, 844 (Pa. Super. 2010). Furthermore, a new trial is justified where the charge can be shown to have caused fundamental prejudice. Pringle v. Rappaport, 980 A.2d 159 (Pa. Super. 2009) (finding that because the erroneous instruction likely misled the jury, rather than clarifying the legal principle at issue, the moving party was entitled to a new trial); Gorman v. Costello, 929 A.2d 1208 (Pa. Super. 2007) (granting a new trial because the trial court's instruction left the

jury without essential tools needed to make an informed decision based on correct and complete legal principles). The Court's instruction was akin to taking the case out of the jury's hands and directing a verdict` in favor of McQueary. If the Court does not enter judgment of the University's behalf, it should grant a new trial on both the defamation and intentional misrepresentation claims.

B. THE COURT ERRED WHEN IT FOUND THAT MCQUEARY PRESENTED SUFFICIENT EVIDENCE TO SUPPORT AN INTENTIONAL MISREPRESENTATION CLAIM

At the close of McQueary's evidence, the University moved for a compulsory non-suit on McQueary's intentional misrepresentation claim because McQueary's evidence was insufficient to support that claim. See N.T. (10/25/2016 (A.M.)) at 63:21-69:2; Non-Suit Brief (Ex. I). The Court denied the Motion. See N.T. (10/25/2016 (A.M.)) at 67:25-69:2. The Court should reconsider now and enter judgment notwithstanding the verdict, or in the alternative, grant a new trial on the misrepresentation claim.

McQueary based his intentional misrepresentation claim on three statements purportedly made by Curley and Schultz to him at a February 2001 meeting. See Complaint (Ex. B) at ¶¶ 15-16, 59-64;[5] N.T. (10/21/2016 (A.M.)) at 45; 51, 54. McQueary claimed that Curley and Schultz told him in February 2001: (1) "that

[5] In paragraph 60 of the Complaint, McQueary mistakenly alleged the meeting occurred in 2011. See id. at ¶ 60.

they thought it [– what McQueary reported to them and to Coach Paterno –] was a serious matter"; (2) "that they would see that it was properly investigated"; and (3) "that appropriate action would be taken." Id., ¶¶ 16, 60.

(1) *Standard for Establishing Intentional Misrepresentation (Fraud)*

To establish an intentional misrepresentation in Pennsylvania, a plaintiff must prove by *clear and convincing evidence* the following elements: (1) misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damages to the recipient as a proximate result. Pittsburgh Live, 615 A.2d at 441-42. Further, a plaintiff must show that the fraud was committed knowingly or through conscious ignorance of the truth. B.O. v. C.O., 590 A.2d 313, 316 (Pa. Super. 1991). "Unsupported assertions and conclusory accusations cannot create genuine issues of material fact as to the existence of fraud." Hart v. Arnold, 884 A.2d 316, 339 (Pa. Super. 2005). Here, McQueary's evidence was deficient in several ways.

(2) *McQueary Did Not Establish a Misrepresentation*

McQueary did not satisfy the first element of a misrepresentation claim: a misrepresentation. See N.T. (10/25/2016 (A.M.)) at 63:25-66:14; 67:16-24; Non-Suit Brief (Ex. I). First, McQueary alleged that Curley and Schultz falsely represented that they thought his allegations were serious. That was no

misrepresentation. Even without the testimony of Curley and Schultz, the record demonstrated that Curley and Schultz took the matter seriously. First, the term "seriously" is subjective and since it is subject to various interpretations, it is not a proper basis for a defamation claim. See Petula v. Mellody, 588 A.2d 103, 108 (Pa. Cmwlth. 1991). President Spanier testified that Curley and Schultz brought McQueary's allegations to his attention at a meeting which occurred on February 12, 2011 and they followed-up in email exchanges through February 28, 2011. See N.T. (10/20/2016 (A.M.)) at 44:24-47:3 (quoting Exhibit P-10). President Spanier testified that the fact that Curley and Schultz elevated this matter to him was consistent with the handling of a serious matter as the volume of matters which a university president has to address at any time requires that senior administrator handle most issues without input from the president. See id. at 43:11-21. Schultz also sought advice from the University's outside general counsel, Wendell Courtney, showing that he took McQueary's allegations seriously. See N.T. (10/17/2016 (P.M.)) at 62:11-64:4; 66:1-67:25; 79:21-80:25.

McQueary also based his misrepresentation claim on Curley and Schultz's representation that the matter would be properly investigated and appropriate action would be taken. See Complaint (Ex. B) at ¶¶ 15-16. McQueary testified that "possibly ten days, roughly a week" after their meeting, Curley called him and stated "we told the Second Mile and we've told Jerry he's no longer allowed to

bring kids into the facility" and "we've decided to take Jerry's keys away." N.T. (10/21/2016 (A.M.)) at 55:11-23. To corroborate this, Plaintiff also introduced into evidence a handwritten note dated February 25, 2001 and purportedly written by Schultz that references alerting The Second Mile and restricting Sandusky's use of the University's facilities. See Note (Exhibit P-9) (Ex. D) and an email dated February 26, 2001 from Curley to Schultz which confirms they intended to inform The Second Mile and to address Sandusky directly regarding use of University facilities. See Email (Exhibit P-12) (Ex. E). This email was sent shortly after the meeting that Curley and Schultz had with McQueary, which McQueary testified took place on February 22 or 23, 2001.

McQueary did not question the appropriateness of the investigation or Curley and Schultz's subsequent actions. Indeed, McQueary expressed shock that Curley was in trouble with the law, "he could not believe it." See N.T. (10/21/2016 (A.M.)) at 68:10-69:3. Also, no evidence disputed that the Second Mile was alerted and that Sandusky's access to University facilities was restricted, as Curley said they would be. As such, McQueary established no misrepresentation and certainly did not do so by clear and convincing evidence.

The Court based its denial of non-suit on a possible jury finding that Curley and Schultz were mandated reporters. See N.T. (10/25/2016 (A.M.)) at 68:1-9. But as explained in the previous section, the record did not show that Curley and

Schultz were mandated reporters. As such, the Court erred in finding adequate evidence to support the misrepresentation claim on that ground.

As McQueary testified, Curley and Schultz explained to him what actions they took in light of their investigation. See N.T. (10/21/2016 (A.M.)) at 55:11-23. That is not a misrepresentation. That also does not show an intention by them to induce McQueary to act based on a false statement. As such, McQueary failed to provide sufficient evidence to support the first, second, or third element of intentional misrepresentation.

(3) McQueary Did Not Establish Justifiable Reliance

To establish justifiable reliance, it is insufficient to simply assert fraudulent conduct, and claim that reliance upon it induced some action. Blumenstock v. Gibson, 811 A.2d 1029, 1038 (Pa. Super. 2002). Absent justifiable reliance, there is no actionable fraud. Bowman v. Meadow Ridge, Inc., 615 A.2d 755, 758 (Pa. Super. 1992). Common sense must be consulted in determining whether the recipient of a statement acts justifiably and reasonably in relying on that statement. See De Martino v. Albert Einstein Med. Ctr., N. Div., 460 A.2d 295, 302 (Pa. Super. 1983). It is not reasonable or justifiable for a person to allow himself to be "lulled into a state of acquiescence" in the face of surrounding circumstances and common sense. See id.

Here, McQueary cannot show justifiable reliance on a misrepresentation. First, as discussed above, McQueary testified that Curley and Schultz explained to McQueary exactly what they planned to do in light of his allegation. According to McQueary and corroborating documentary evidence, Curley and Schultz advised the Second Mile charity of McQueary's observations about Sandusky, barred Sandusky from bringing children into the facility, and took Sandusky's keys away. See N.T. (10/21/2016 (A.M.)) at 55:11-23; Note (Exhibit P-9) (Ex. D), Email (Exhibit P-12) (Ex. E). McQueary did not testify that Curley or Schultz stated or implied to McQueary that they would go to law enforcement or a child welfare agency. Therefore, it was not justifiable for McQueary to rely on assurances that were never made.

Further, since McQueary was well informed of the actions taken by the University, he cannot plausibly claim that it was justifiable for him to not have called – at any time during the next decade – the State College or Pennsylvania State Police, the Centre County District Attorney's Office, or the Department of Public Welfare or to have followed-up with the administration. McQueary's life was that University and that football team. He knew that Sandusky remained in the community and was not criminally held responsible. N.T. (10/21/2016 (A.M.)) at 56:23-57:14. For these reasons, McQueary did not establish that he justifiably relied on the statements of Curley and Schultz.

(4) *McQueary Did Not Establish Factual Causation or Legal Causation*

Similarly, McQueary cannot demonstrate the 2001 statements made by Curley and Schultz factually caused or proximately caused damages to McQueary in 2011. "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. An act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred." See Gorman, 929 A.2d at 1212. Proximate cause is present if a wrongful act "was a substantial factor in bringing about the plaintiff's harm." Eckroth v. Pa. Elec., 12 A.3d 422, 428 (Pa. Super. 2010). "A determination of proximate or legal causation therefore essentially regards 'whether the alleged negligence was so remote that as a matter of law, the defendant cannot be held legally responsible for the subsequent harm.'" Id. (quoting Holt, 932 at 921). Put another way, "[p]roximate cause does not exist where the causal chain of events resulting in plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm." See Commerce Bank v. First Union Nat'l Bank, 911 A.2d 133, 141 (Pa. Super. 2006). Therefore, the trial court must determine whether an ordinary person would have foreseen the injury as the natural and probable outcome of the complained-of act. Id.

When determining foreseeability, the Court should consider the following elements: (a) the number of other factors which contribute to producing the harm

and the extent of the effect which they have in producing it; (b) whether the actor's conduct created a force or a series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (c) lapse of time. Id. (citing Holt v. Navarro, 932 A.2d 915, 921 (Pa. Super. 2007)).

To succeed with his misrepresentation claim, McQueary had the high burden of showing by *clear and convincing* evidence that a decade-old representation that Curley and Schultz would conduct an investigation and take appropriate actions would permit an ordinary person to foresee damages a decade later. McQueary cannot meet this high standard.

As a threshold matter, "Pennsylvania courts have consistently held that a lapse of time between a defendant's alleged conduct and a plaintiffs [sic] alleged damages can, under the right circumstances, serve as a complete bar to recovery." See Zimmerman v. Zimmerman, No. CI-15-01440, 2015 Pa. Dist. & Cnty. Dec. LEXIS 2803, at *18 (C.P. Lancaster 2015) (citing Eckroth, 12 A.3d at 428). The delay here was a decade long. The passage of time in this situation is sufficient to find a lack of factual or proximate cause. This is not a latent situation that foreseeably exposed itself years later like a slow growing cancer that a physician failed to tell his patient about when it was first discovered. Rather, McQueary knew he, the witness, was not approached for a decade by law enforcement or

child welfare. McQueary also worked at the University and lived in the community. He had ample opportunity to observe that Sandusky suffered no criminal consequences. See N.T. (10/21/2016 (A.M.)) at 56:23-57:14. He had ample opportunity to ask Curley, Paterno, Spanier, or Schultz about the status of any additional investigation. He did none of that. As such, factual and proximate causation are not present here. According to McQueary's own testimony, he knew that he was the only person to witness the alleged conduct in the shower. See N.T. (10/20/2016 (P.M.)) at 50:17-51:51:9; N.T. (10/21/2016 (A.M.)) at 49:5-17. No law enforcement officer had ever followed up with him during that decade. It is beyond the pale for him to now claim that he did not learn until 2011 that no investigation had been done. See N.T. (10/21/2016 (P.M.)) at 178:9-179:7.

McQueary's argument in support of causation strains logic. McQueary's allegation is that Curley and Schultz's comments were meant to induce him to not report Sandusky's actions to law enforcement. See Complaint (Ex. B) at ¶ 61. But that argument only makes sense (arguably) if there was no follow up from Schultz and Curley. However, the undisputed facts are that no more than two weeks after the alleged representation, Curley and Schultz followed up with McQueary to inform him of the actions they took. N.T. (10/21/2016 (A.M.)) at 55:11-23. McQueary raised no objection. See N.T. (10/23/2016 (A.M.)) at 54:17-55:23.

McQueary introduced no evidence that Curley and Schultz either stated or implied that they reported or planned to report Sandusky to law enforcement or a child welfare agency. If McQueary felt that his observation should be reported, there is no evidence that anything allegedly said by Curley or Schultz would have caused him not to report his observations. As such, there is no evidence that whatever Curley and Schultz may have said to McQueary was the cause for McQueary not alerting the authorities. As for proximate cause, an ordinary person would not think that Curley and Schultz induced him not to report his observations to authorities. Put another way, Curley and Schultz's statement that they would investigate the matter and take appropriate actions did not create "a force or a series of continuous forces" that led to McQueary's harm. Commerce Bank, 911 A.2d at 141. Rather, once they gave McQueary an update (which did not include alerting law enforcement or child welfare), the force no longer exerted any power over McQueary. He was under no inducement to stay silent about what he saw.

Finally, McQueary asserted that the misrepresentations made it appear that he was part of a cover-up. N.T. (10-25-16 (A.M.) at 67:5-10. No evidence was submitted to show that McQueary failed to find a new job due to the perception he was involved with a cover-up. Rather, the reasons provided at trial for McQueary;s inability to find employment were that he walked out of the locker room without intervening on behalf of the boy and that his presence would cause a

media frenzy that would distract from a new coach and athletic director. N.T. (10/26/2016 (P.M.)) at 3:2-7; (10/20/2016 (P.M.)) at 79:11-80:12 99:19-100:3; N.T. (10/21/2016 (P.M.)) at 141:15-142:9.

For all these reasons, McQueary failed to show by clear and convincing evidence that any statements by Curley and Schultz proximately caused him any damage. In fact, no evidence supported McQueary's misrepresentation claim at all. Curley and Schultz made no misrepresentation.[6] Further, the Court erred by instructing the jury that it was required to find the University liable for misrepresentation if McQueary reported to Curley and Schultz that he observed sexual misconduct against a minor and they were mandated reporters under Pennsylvania Law.

(5) *The Statute of Limitations for the Intentional Misrepresentation Claim Lapsed*

In addition to the above, the time to file the misrepresentation claim has passed. A plaintiff has two years to bring an action for injury based on intentional misrepresentation. 42 Pa.C.S.A. § 5524(a)(7). The alleged misrepresentation occurred in mid-February 2001. See N.T. (10/21/2016 (A.M.)) at 54:12-21. McQueary waited until 2012 to file his complaint, about eight years after the

[6] Relatedly, as discussed in Section I(A) of the Legal Analysis, the Court erred by tying the misrepresentation claim to the status of Curley, Schultz, and Spanier as mandated reporters. No evidence established that they were mandated reporters. See supra Section I of Legal Analysis.

statute had run. See generally Complaint (Ex. B). Therefore, this claim is out of time. See Answer to Complaint (Ex. AA) at ¶ 75 (pleading statute-of-limitations new matter).

McQueary cannot avail himself of the discovery rule because he failed to exercise any due diligence to determine whether the University contacted authorities about Sandusky's conduct. See Wilson v. El-Daief, 964 A.2d 354, 356 (Pa. 2009). McQueary remained affiliated with the University and had access to his Athletic Director, Curley; his boss, Joe Paterno; and other University officials to further inquire about whether the University took any additional steps as a result of Sandusky's actions. He did not do so. Moreover because McQueary knew he had not been contacted by law enforcement, he also should have known there were not any law enforcement investigations being done. Accordingly, the statute of limitations has lapsed and entry of judgment notwithstanding the verdict is appropriate. See N.T. (10/21/2016 (P.M.)) at 178:9-179:7.

(6) *Conclusion*

For all the foregoing reasons, the Court should enter judgment notwithstanding the verdict on the misrepresentation claim or, in the alternative, grant a new trial.

C. THE ALLEGED DEFAMATORY STATEMENT WAS AN OPINION THAT AS A MATTER OF LAW WAS NOT DEFAMATORY

To be adjudged defamatory, a communication must have been found to have the defamatory meaning ascribed to it by the complaining party. See Baker v. Lafayette Coll., 532 A.2d 399, 402 (Pa. 1987). To reach this conclusion, the court must view the statements in context and "determine whether the statement was maliciously written or published and tended 'to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.'" (citations omitted). Id. (quoting Corabi v. Curtis Publishing Co., 273 A.2d 899, 904 (1971)). An "opinion without more does not create a cause of action" for defamation. Id. To overcome this rule, the "allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." Id. (citing Beckman v. Dunn, 419 A.2d 583, 587 (Pa. Super. 1980)).

McQueary's defamation claim is based on a statement released by President Spanier after the indictments of Curley and Schultz were announced:

> The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.
>
> With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16

> years. I have complete confidence in how they have handled the allegations about a former University employee.
>
> Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.
>
> Graham Spanier

See Complaint (Ex. B) at ¶¶ 50-58; Statement (Exhibit D-20) (Ex. F). McQueary further alleged that these statements were repeated by President Spanier at the Athletic Department staff meetings. See id. at ¶ 51.

This statement does not mention McQueary. It does not set forth any wrongdoing by anyone who would be commonly understood to be McQueary. Rather, it states President Spanier's confidence in the men he had worked with for over 16 years. It was a forward-looking statement that he was "confident the record will show that these charges are groundless. . . ." Complaint (Ex. B) at ¶¶ 50-58. David Joyner, the Athletic Director who replaced Curley, testified as such: "[Spanier's statement was] rather forward looking without, perhaps, any knowledge specific to those statements made." N.T. (10/19/2016 (P.M.)) at 156:23-157:19; see id. at 127:2-11. This is not a defamatory statement, but an opinion that Spanier's long experience with these officials led him to believe that they conducted themselves properly.

The case of Gordon v. Lancaster Osteopathic Hosp. Ass'n., 489 A.2d 1364, 1369 (Pa. Super. 1985) is instructive. The court considered whether a letter by

physicians to a hospital's board of directors that expressed "a vote of no confidence" in the hospital's pathologist, "a lack of confidence," "lack of trust in the reporting ability of [the pathologist]," and criticism of his attitude was defamatory. Id. at 1367. The Superior Court held that these "words . . . bear no reasonable interpretation which would render them defamatory." Id. The phrases used "do not impute a charge of incompetency or unfitness" and "state no more than in the most general terms that appellees, speaking for their departments, lacked confidence in appellant's professional ability and could not recommend that his contract be renewed." Id.

Here, the statement by Spanier did not go as far as the physician in Gordon. Again, Spanier's statements only concern confidence in his employees. His statement did not mention McQueary even indirectly. If the physicians in Gordon failed to publish a defamatory statement, Spanier certainly did not do so either.

For similar reasons, the University is not liable for defamation by innuendo. See Sarkees v. Warner-West Corp., 37 A.2d 544, 546 (Pa. 1944). When words are "not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo," the statement "cannot be made [libelous] by an innuendo which puts an unfair and forced construction on the interpretation" of the statement. Under Pennsylvania law, it is for the trial court to determine, in the first instance, whether the communication complained of is capable of a defamatory meaning.

E.g., Sarandrea v. Sharon Herald Co., 30 Pa.D.&C.4th 199, 201 (C.P. Lawrence 1996); U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir. 1990) (applying Pennsylvania law). Here, Spanier's statement could only be understood to express confidence in Curley and Schultz – employees with whom he worked for over 16 years. The Court erred by not finding that the allegedly defamatory statements were a matter of pure opinion and could not support a defamation claim. Consequently, the University seeks judgment notwithstanding the verdict on the defamation claim, or, in the alternative, a new trial.

II. MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, A NEW TRIAL, OR REMITTITUR

A. THE DAMAGES AWARDED BY THE JURY WERE NOT SUPPORTED BY THE EVIDENCE

The University asked this Court to instruct the jury that McQueary "should not profit from or be overcompensated for any alleged harm he sustained." See Proposed Points of Charge (Ex. J) at No. 45. Further, the University asked the court to instruct the jury that "future damages must permit more than a mere guess or speculation." See id. at No. 47. The Court did instruct the jury that its award could not be speculative and any award must contain some nexus between the harm and the reasonable level of compensation. N.T. (10/27/2016) at 138:13-22.

The jury rendered identical compensatory damage awards ($1.15 million) for both the misrepresentation and the defamation claim. See Jury Verdict Slip (Ex. A). Because the issues in this case were so intertwined, the University proposed that it provide the Court with special interrogatories in addition to a sample verdict slip to reduce the chance of duplicate damages. N.T. (10/26/2016 (P.M.)) at 62:12-17. See also November 30, 2016 Order and Opinion of Court (recognizing that claims are intertwined). The judge refused the University's request to submit special interrogatories, instructing it to only submit a straightforward verdict slip. N.T. (10/26/2016 (P.M.)) at 62:15-63:4. The court limited the verdict slip to a determination of whether the University was liable on each claim (Yes or No) and what were the resulting damages. Id. at 62:20-63:4. Such a verdict slip was inadequate to prevent an improper duplication of damages. The next day when the University looked to submit both special interrogatories and a verdict slip, the Court refused to accept them. See Affidavit of George Morrison (Ex. K).

The jury's identical verdict of $1.15 million in compensatory damages for each claim suggests that the jury awarded double damages in the case.[7] It is a

[7] It is the University's position that there is also duplication of damages between these claims and the Court's award in the Whistleblower claim. The University will address this issue in more detail in the post-trial motion for the Whistleblower claim.

basic principle of tort law that damages are intended to put the injured person "in a position as nearly as possible equivalent to his or her position prior to the tort." Moorhead v. Crozier Chester Med. Ctr., 765 A.2d 786, 790 (Pa. 2001) (citing Trotsky v. Civil Serv. Comm'n, 652 A.2d 813, 817 (Pa. 1995)). The law is well-established, however, that a court will not allow that person to recover twice for the same injury. Rossi v. State Farm Auto. Ins. Co., 465 A.2d 8, 10 (Pa. Super. 1983) (citing Thompson v. Fox, 192 A. 107 (Pa. 1937)). In other words, a damage award which provides a windfall to a plaintiff "would violate fundamental tenets of just compensation." Moorhead, 765 A.2d at 790. Because special interrogatories were not permitted, it is impossible to know how the jury reached identical awards for each claim.

Regardless of the issue of the use of special interrogatories, the award was not supported by the evidence. McQueary provided no evidence that he had a future at the University once Paterno left either due to the Sandusky matter or his death soon after. In fact, his severance agreement contemplated his separation from the University after Paterno was replaced as head coach. See Severance Agreement (Ex. L). Furthermore, Paterno's successor, Bill O'Brien, had a preset list of coaches he wanted to hire including Stan Hixon for the position then filled by McQueary. Trial Deposition of Coach William O'Brien (Ex. M) at 9:6-10:9; 20:2-24 (read into the trial record at N.T. (10/26/2016 (P.M.)) at 15:8-13). More

pointedly, Coach O'Brien testified that based on McQueary's media guide biography nothing about him stood out that would cause Coach O'Brien to want to meet or hire McQueary. See id. at 15:4-5, 15:9-13; 30:16-25.

Further, McQueary provided no evidence that any potential employer, whether it be for a football or non-football position, declined to interview or hire McQueary due to any action taken by the University. To the contrary, Coach Rhule testified that the media coverage may have hurt McQueary's employability. (10/26/2016 (P.M.)) at 3:2-7 (reading into testimony Trial Deposition of Coach Matt Rhule (Ex. N) at 129:8-130:6). Specifically, Coach Rhule believed that reports of McQueary leaving the boy in the shower with Sandusky would hurt his chances of employment. See id. The Savannah State University football coach testified that the media attention would be a distraction for a new coach and athletic director. See N.T. (10/20/2016 (P.M.)) at 79:11-80:12 99:19-100:3. McQueary also recounted an exchange with a contact at Duke University, who assessed that McQueary was "radioactive" because "[h]e is quickly remembered as the guy that did not call the cops" and "[h]is distinctive appearance does not help." N.T. (10/21/2016 (P.M.)) at 141:15-142:9. He further opines that if McQueary is seen interviewing at Duke University it is an "instant story, perhaps not a positive one." Id. at 142:12-17. Because McQueary cannot show that he lost any work due

to the University's actions, any award of front pay was purely speculative and improper.

Further, McQueary did not provide any evidence to support an award of emotional damages. As such, to the extent any part of the award is compensation for emotional damages, it is purely speculative. However, we do not know what portion of the award the jury may have based on emotional damages because the Court did not permit special interrogatories.

The jury's compensatory award of $2,300,000 is the product of a mistake of fact or law, or as a result of some or all of the errors that occurred during trial as discussed herein. The award was against the weight of evidence and inconsistent with the proofs of losses McQueary allegedly sustained. It is also plainly excessive, grossly exorbitant and shocks the conscience. In such cases, the Court is empowered to enter judgment notwithstanding the verdict, award a new trial, award on new trial as to damages only, or remit the award to comply with the evidence.

B. UNDER PENNSYLVANIA LAW, PUNITIVE DAMAGES ARE AVAILABLE TO A PLAINTIFF ONLY UPON A SHOWING OF AGGRAVATED CONDUCT BEYOND THE UNDERLYING FRAUD, MCQUEARY DID NOT MAKE SUCH A SHOWING

The Supreme Court of Pennsylvania has long held that only compensatory damages are available for an intentional misrepresentation claim. See Erie City Iron Works v. Barber, 102 Pa. 156, 164, 13. W.N.C. 492 (1883) (holding damages

for a misrepresentation about the quality of a boiler was "compensatory only" and could not be "vindicatory"); see also, e.g., High v. Berret, 23 A. 1000 (Pa. 1892) (holding that the measure of damages in an action for deceit is the "actual loss"). In 1922, the Supreme Court first held that a fraud claimant may be awarded punitive damages if he or she shows extreme aggravating circumstances beyond the underlying fraud. See Long v. McAllister, 118 A. 506, 508 (Pa. 1922).

Perhaps, the clearest and strongest statement of this rule comes from the Superior Court in Smith v. Renault, 564 A.2d 188 (Pa. Super. 1989). In Renault, the Superior Court found sufficient evidence that an agent committed fraud by misrepresenting the amount of termite damage. Renault, 564 A.2d at 192. But this same evidence was insufficient to support a punitive damages claim, as no evidence of malice, vindictiveness, or a wholly wanton disregard of the rights of others was shown. Id. at 193-194. The Superior Court reasoned, "fraud which is the basis for the recovery of compensatory damages . . . is not alone a sufficient basis upon which to premise an award of punitive damages." Id. "If the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law." Id. See, e.g., Pittsburgh Live, Inc. v. Sevov, 615 A.2d 438, 442 (1992) (holding that evidence surrounding a real estate agreement may support a fraud claim, but could not support a punitive damages claim because no acts of malice or vindictiveness were shown). The Third and Seventh Circuits have both interpreted

Pennsylvania law to require something more than fraud in order to permit punitive damages. See Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 741 (3d Cir. 1992) (holding that punitive damages will not be awarded in Pennsylvania unless there is evidence of "a quantum of outrageous conduct in addition to that undergirding the fraud liability and compensatory damages."); In re Lemington Home for the Aged, 777 F.3d 629, 631 (3d Cir. 2015) (same); Contractor Utility Sales Co., Inc. v. Certain-Teed Corp., 748 F.2d 1151, 1156 (7th Cir. 1984) (holding that punitive damages are not an "automatic incident" of a plaintiff's showing of fraud at trial; rather, something must be outrageous and aggravated about the defendant's conduct).

Here, the University asked the Court to instruct the jury that more than an intentional tort is required to award punitive damages to McQueary. See Proposed Points of Charge (Ex. J) at No. 53. The Court denied the University's request and continued to instruct the jury that intentionality suffices to establish the imposition of punitive damage. See N.T. (10/27/2016) at 142:21-144:21. That instruction is incorrect and its prejudice was not harmless.

As noted earlier, McQueary failed to establish intentional misrepresentation at all. Even if he did, he did not show "a quantum of outrageous conduct" in addition to the facts undergirding the misrepresentation liability that would support punitive damages. The alleged misrepresentations were that Curley and Schultz

were taking the matter seriously, would conduct a proper investigation, and take appropriate action. See Complaint (Ex. B) at ¶ 61. McQueary testified that "possibly ten days, roughly a week" after making those representations he received a call from Curley where Curley advised McQueary that they "told The Second Mile and we've told Jerry he's no longer allowed to bring kids into the facility" and "we've decided to take Jerry's keys away." N.T. (10/21/2016 (A.M.)) at 55:11-23. No evidence was shown that the misrepresentation involved anything more than these statements. No testimony exists that any effort was made by the University to falsely suggest that they went to law enforcement or a child welfare agency. No evidence was provided that the University falsely claimed that an investigation was ongoing, when it was not. Rather, Curley and Schultz truthfully reported the steps that were taken in response to his report. As such, McQueary has failed to show any aggravating circumstances beyond any underlying misrepresentation. Long v. McAllister, 118 A. 506, 508 (Pa. 1922). This error was not harmless.

Renault, mentioned earlier, is instructive. Renault concerned a sale of a personal residence. During the sale of the home, the realtor advised the buyer that the home suffered "minor termite damage, but had been repaired, so you don't need to worry about it." Renault, 564 A.2d 190. After buying the house, Smith discovered additional termite damage that was hidden by strips of tape covered by

paint. Id. The buyer sued the realtor for fraudulent concealment based on the intentional misrepresentation. See id. The jury found for the buyer and awarded punitive damages in addition to compensatory damages. See id. The Superior Court reversed and remanded for reconsideration of the punitive damage award.

The Superior Court found that to justify punitive damages, "there must be acts of malice, vindictiveness and a wholly wanton disregard of the rights of others." Id. at 193. The Court found that evidence lacking. Id. at 194. While the realtor may have "minimized the termite damage by misrepresenting its seriousness and the extent to which it had been remedied, they did disclose that the property had been infested with termites which had been exterminated." Id. That was enough for the Superior Court to find punitive damages inappropriate.

The facts are similar here. McQueary testified that Curley and Schultz said that they would look into his accusations, they did and they reported the proposed course of action. No evidence supports that such statements were made due to some malice, vindictiveness and a wholly wanton disregard for McQueary's rights. Under the standard set forth in Renault, this is insufficient to establish punitive damages. Accordingly, this Court should enter judgment notwithstanding the verdict and dismiss the claim for punitive damages. Alternatively, the Court should remit the award of punitive damages or conduct a new trial on punitive damages only.

III. MOTION FOR A NEW TRIAL

A. THE UNIVERSITY WAS UNFAIRLY PREJUDICED BY THE COURT'S REFUSAL TO STAY THIS MATTER TO PERMIT THE UNIVERSITY TO SPEAK TO KEY WITNESSES AND PRODUCE THOSE WITNESSES AT TRIAL

(1) *Introduction*

A hallmark of a fair trial is the meaningful opportunity to offer relevant and competent evidence on each material issue. See, e.g., Am. Future Sys., Inc. v. Better Bus. Bureau, 872 A.2d 1202, 1212 (Pa. Super. 2005); see also Mathews v. Eldridge, 424 U.S. 319, 222 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner") (internal citations omitted). A meaningful opportunity to be heard requires that parties are allowed to call witnesses and proffer other admissible evidence. See Mathews, 424 U.S. at 322.

Here, the University was not permitted to call as witnesses or even speak to two key witnesses, Curley and Schulz, because they were under indictment for related, alleged conduct and chose for themselves to invoke their Fifth Amendment privilege against self-incrimination. See N.T. (10/25/16 (A.M.)) at 56:22-57:22 (Court Exhibit 2). The University twice sought a stay to remedy this inequitable situation. First, it moved for a stay at the beginning of the litigation. See generally First Motion to Stay and Supporting Brief (Ex. O). Second, the University moved for a stay after the parties engaged in discovery. See generally Second Motion to

Stay and Supporting Brief (Ex. P). The Court denied both motions. See Order and Opinion (12/20/2012) (Ex. Q); Order and Opinion (8/15/2016) (Ex. R).

(2) *Standard for Granting a Stay*

Every court has the inherent power to schedule cases on its docket to advance a fair and efficient adjudication. "Incidental to this power is the power to stay proceedings, including discovery." Luckett v. Blaine, 850 A.2d 811, 819 (Pa. Cmwlth. 2004).

Parallel civil and criminal proceedings arising from the same conduct raise unique concerns:

> On the one hand, a parallel civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery or testimony elicited in the civil litigation. . . . On the other hand, the pendency of a parallel criminal proceeding can impede the search for truth in the civil proceeding if the accused resists disclosure and asserts his privilege against self-incrimination and thereby conceals important evidence.

See Parallel Civil & Criminal Proceedings ("Parallel Proceedings") (Ex. S), 129 F.R.D. 201, 202 (1990) (Pollack, J.). The power to grant a continuance in a civil case due to a parallel criminal proceeding is "an inherent power of a court and ordinarily is discretionary." Cotter v. State Civil Service Commission, 297 A.2d 176, 178 (Pa. Cmwlth. 1972); U.S. v. Mellon Bank, N.A., 545 F.2d 869, 873 (3d Cir. 1976). In making such a decision, "the chief consideration is whether the

grant or denial [is] in furtherance of justice." Cotter, 297 A.2d at 178. The court must also balance the prejudice faced by the requesting party if the continuance is not granted against the prejudice faced by the opposing party. Id.

To guide its discretion in deciding whether to stay a civil case pending a related criminal case, a court should consider (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. E.g., In Re Adelphia Communications Securities Litigation, Civ. A. No. 02-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003) (citing Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd., 7 F.Supp.2d 523 (D.N.J. 1998)). The court should also consider the interests of non-parties. In Re Plastics Additives Antitrust Litigation, 2004 WL 2743591, at *4 (E.D. Pa. Nov. 29, 2004); Kaiser v. Stewart, 1997 WL 66186, at *2 (E.D. Pa. Feb. 6, 1997); Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (all listing factors similar to those in Adelphia Communications in addition to the interests of non-parties).

Each of these factors weighs in favor of staying this case pending resolution of the related criminal proceedings.

(3) *Substantial overlap existed between the pending criminal trials and this civil trial.*

The amount of overlap between the civil and criminal proceedings is generally regarded as the most important factor. See Adelphia Comms, 2003 WL 22358819 at *3 (citing Walsh Securities, 7 F.Supp.2d at 527); Parallel Proceedings, 129 F.R.D. at 203.

Courts applying Pennsylvania law have granted a stay when a significant overlap between related civil and criminal proceedings exists. In Anderson v. Scott, 2011 WL 10795429 (C.P. Lawrence 2011), the trial court addressed a defendant-physician's request to stay his deposition in a wrongful death action due to his plan to invoke the Fifth Amendment in related criminal proceedings against him. Id. at *1-2. The criminal complaint against the defendant-physician included similar allegations of medical malfeasance, but did not involve the decedent in the civil case. Id. Even though the cases involved different decedents, the court found overlapping evidentiary issues, stating that "any evidence offered against the defendant in the civil case would be relevant to the criminal case. This factor weighs heavily in favor of granting the defendant's request for a protective order and stay his deposition until a conclusion of the criminal case." Id. See also Adelphia Communications, 2003 WL 22358819, at *1 (holding that since one of 24 criminal counts involved issues and allegations similar to those in the private securities lawsuits, this factor weighed heavily in favor of the stay).

In denying the first Motion to Stay, the Court found that "while there may be overlapping witnesses, there are no overlapping issues in the criminal and civil cases." See Order and Opinion (12/20/2012) (Ex. Q) at p. 7. In denying the Second Motion to Stay, the court correctly found that there were overlapping issues regarding the misrepresentation claim. See Order and Opinion (8/15/2016) (Ex. R) at p. 5. As the Court recognized, McQueary's misrepresentation claims concerned Curley and Schultz's actions during and after their investigation of McQueary's report. Id. Likewise, the charges of child endangerment and failure to report suspected child abuse which Curley and Schultz were set to face in their criminal cases concern that same conduct. Further, contrary to the Court's finding, the defamation claim also overlaps with the issues in the criminal cases. The allegedly defamatory statement was an expression of trust by Spanier in his two co-workers. Whether his trust was justified is best answered by the testimony of Curley and Schulz regarding what they actually did.

Indeed, the overlap of issues for both the defamation claim and the misrepresentation claim is broader than recognized by the Court. Schultz and Curley invoked their Fifth Amendment privilege with respect to the following issues, each of which is highly relevant in this case: (1) all facts and circumstances regarding their knowledge and involvement in a 1998 incident involving Sandusky and a child; (2) all facts and circumstances regarding Curley and Schultz's 2001

involvement with McQueary's alleged report of "highly inappropriate sexual misconduct" as between Sandusky and a child; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between them and McQueary regarding that report; (4) information related to their employment histories and job duties with the University; and (5) various 2011 communications between them and non-parties regarding the allegations of the Complaint. See Second Motion to Stay (Ex. P) at ¶ 24 (citing Deposition Transcript of Gary Schulz at pp. 62-65); id. at ¶ 29 (citing Deposition Transcript of Timothy Curley at pp. 46-54). All of these issues are critical to the University's defenses.

Although the Court acknowledged significant overlap between the misrepresentation allegations and the pending criminal actions against Curley and Schulz, it did not find that this factor weighed in favor of a stay. See Order and Opinion (8/15/16) (Ex. R) at p. 5. In fact, the Court found that this factor weighed **against** a stay. Id. According to the Court, the University "[c]ertainly . . . as the possessor of its own records had had adequate time to search them to determine what, if any, action they took in order to refute [McQueary's] claim." Id. The Court had no factual basis to find that the University possessed any records regarding Curley and Schultz's investigation and subsequent actions. In fact, the University did not. Further, even if records did exist, the University should have had an opportunity to question Curley and Schultz about them.

Additionally, the Court found that the use of special interrogatories "would enable the Court to assess and address the impact of . . . Curley['s] and Schultz's unavailability on any verdict rendered on the misrepresentation count and take appropriate action, if required." Id. However, the Court denied the University's request for special interrogatories. See N.T. (10/26/2016 (P.M.)) at 62:12-63:4.

The Court erred when it twice found that this factor weighed against a stay. Rather, this factor, the most important factor, weighed heavily in favor of a stay.

(4) *The Status of the Criminal Proceedings Weighed in Favor of a Stay.*

The second factor is the status of the criminal proceedings, including whether any defendants had been indicted. "The strongest case for a stay in a civil case occurs during a criminal prosecution after an indictment is returned." Parallel Proceedings, 129 F.R.D. at 204; Adelphia Communications, 2003 WL 22358819, at *3. The need for a stay is greatest after an indictment is returned because of the potential for self-incrimination faced by the criminal defendants, and any prejudice to the civil litigants is mitigated because the criminal case is likely to be resolved promptly under the jurisdiction's speedy-trial rules. Walsh Securities, 7 F.Supp.2d at 527 (quoting Parallel Proceedings (Ex. S), 129 F.R.D. at 203). Further, the prevailing case law in Pennsylvania and its neighboring district courts provides that delaying a civil matter is appropriate when a criminal trial is reasonably close

at hand. Anderson, 2011 WL 10795429, at *2-3 (citing State Farm Mut. Auto. Ins. Co., 2002 WL 31111766, at *3 (U.S.D.C. 2002).

Here, both Curley and Schultz are under indictment for allegedly criminal acts based on the same critical facts and circumstances that underlie the claims asserted by McQueary in this case. Schultz and Curley invoked their Fifth Amendment privilege and refused to discuss the claims in the instant civil action. The stage of the criminal proceedings favored a stay of this action. The Dauphin County Court of Common Pleas' May 25, 2016 Scheduling Order demonstrated that the criminal matters were moving forward with meaningful progress. See Scheduling Order (Ex. T). Indeed, trial is now scheduled for next month, March 2017. See February 1, 2017 Order (Ex. U). The delay was not very long and was necessary to prevent manifest injustice.

(5) *The Issuance of a Stay Would Not Have Unfairly Prejudiced McQueary.*

The third factor is the prejudice to the plaintiff caused by the delay. To show prejudice, the plaintiff must establish "more prejudice than simply a delay in his right to expeditiously pursue his claim. . . . Instead, the plaintiff must demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay." Adelphia Communications, 2003 WL 22358819, at *4. In Adelphia Communications, the District Court found that the plaintiffs did not demonstrate sufficient prejudice to warrant lifting the

stay, as they had not shown "any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay." Id. at *4 (citing Walsh Securities, 7 F.Supp.2d at 528).

Here, McQueary cannot establish a "particularly unique injury." Once Coach Paterno was removed and permanently replaced from the football program, McQueary was likely out of a job. See Severance Agreement (Ex. L); N.T. (10/26/2016 (A.M.)) at 88:21-90-12. Regardless of whether the trial proceeded, the fact that the public knew he did not immediately intervene and left Sandusky in the locker room with the boy would likely adversely affect his ability to find a new job. Therefore, his lack of employment was not attributable to the stay. A stay also would not have hindered McQueary's ability to conduct discovery. By the time of the University's second request for a stay, McQueary had already received a voluminous amount of written discovery and he had conducted numerous depositions of his self-identified key witnesses. Accordingly, McQueary would not suffer any economic harm from a stay. If after a stay he had been successful on any of his claims, he would have been able to recover interest as part of his judgment. See Walsh Securities, 7 F.Supp.2d at 528. Further, as evidenced by the criminal court's May 25, 2016 scheduling order, trial was set to commence in the near future and is now expected to start next month.

On ruling on the second motion for a stay, the court stated that this factor was "dispositive." Order and Opinion (8/15/2016) (Ex. R) at p. 5. However, despite the importance the Court placed on this factor, it nonetheless relied on "informal" information from McQueary that he was unable to get a job and that he had expended the resources available to him. The University was prejudiced by the Court's refusal to conduct a hearing to have McQueary make a showing under penalty of perjury that he had suffered a unique injury. He could not make such a showing. This factor supported a stay.

(6) *The Failure to Impose a Stay Significantly Impeded the University's Ability to Prepare and Present a Defense.*

The next factor is the burden on the University. The University was significantly prejudiced by the Court's refusal to stay the case for the same reasons that, as described above, there was significant overlap between this case and the pending criminal cases against Curley and Schultz. The University was denied access to two key witnesses whose insight could have helped develop defenses and whose support and corroboration might have aided the presentation of the University's defenses. Because the facts and claims are intrinsically intertwined with the factual allegations in the underlying criminal charges against Schultz and Curley, the University was severely constrained during discovery and at trial.

McQueary's defamation and intentional misrepresentation claims each raise factual questions that ultimately relate to the February 2001 incident and the

actions and communications of McQueary, Curley, and Schultz in response to it. The University could not fully explore such questions without access to Curley and Schultz and was significantly prejudiced in its ability to defend against those claims at trial.

The University was particularly prejudiced in its ability to defend against McQueary's intentional misrepresentation claim. In particular, McQueary's intentional misrepresentation claim involves the state of mind of Schultz and Curley, as well as remaining substantial questions of fact as to the substance of communications between them and McQueary regarding McQueary's report of misconduct. Without the testimony from Schultz and Curley, the University was unable to adequately develop its defenses, including testing the veracity of what McQueary claims to have allegedly caused him millions of dollars in damages.[8] Similarly, the defamation claim concerned whether Spanier reasonably trusted the actions taken by Curley and Schultz.

[8] McQueary's whistleblower claim also illustrates this point. As protected reporting activity supporting his whistleblower claim, Plaintiff relies on his grand jury testimony and his testimony at the December 2011 criminal preliminary hearing against Curley and Schultz. Without the ability to question Curley and Schultz about what, specifically, McQueary communicated to them in February 2001 and how, specifically, they responded to McQueary at that time, the University cannot fully explore the factual issues of McQueary's multiple claims.

This factor clearly weighed in favor of the stay. In hindsight, the prejudice suffered by the University by refusing to issue the stay was compounded by the Court's erroneous decisions (1) to instruct the jury that it may make an adverse inference from Curley's and Schultz's decisions to invoke their Fifth Amendment constitutional protections; and (2) to instruct the jury that Curley, Schultz, and Spanier were mandated reporters. As discussed below, the adverse inference was improper, and the record did not show that Curley and Schultz were mandated reporters under the law in place in 2001. This confluence of decisions by the Court created an atmosphere where the jury was compelled to find the University liable not due to the evidence before it, but due to the legal decisions made by the Court. This situation would have been avoided if the University's Motion for a stay had been granted.

(7) *A Stay would have Advanced the Interests of the Court.*

The fifth factor concerns the interests of the trial court. The Court found that this factor weighed against a stay because "my interest is and has been to promptly resolve this case." See Order and Opinion (8/15/2016) (Ex. R) at p. 8. As other judges have recognized, prompt resolution of McQueary's claims is only one consideration when evaluating the interests of the Court. If it were the only factor, the Court's interests would be no different than McQueary's.

In evaluating its interests, the court must consider efficiency as well as expediency. E.g., Adelphia Communications, 2003 WL 22358819, at *5. A stay would have promoted judicial economy both at the time of the first stay request (early in the litigation) and at the time of the second stay request (late in the litigation). Resolution of the criminal cases would have increased prospects for settlement of the civil case and removed the need for discovery and a trial. See Parallel Proceedings (Ex. S) at 204; Doe v. Pa. State Univ., No. 4:12-CV-2068, 2013 U.S. Dist. LEXIS 21604, at *7 (M.D. Pa. Feb. 14, 2013). It would have also prevented the need to engage in piecemeal litigation and trial practice, which is generally disfavored by courts as inefficient and costly to all involved. See, e.g., McClendon v. Dougherty, No. 2:10-CV-1339, 2011 WL 4345901, at *1 (W.D. Pa. Sept. 15, 2011); Carpenter Technology Corp. v. Armco, Inc., Civ. A. No. 90-0740, 1990 WL 61180, at *4 (E.D. Pa. May 8, 1990).

Staying this civil action could have preserved judicial resources, promoted judicial efficiency, saved the parties unnecessary expense, and avoided further piecemeal litigation. At the time each motion to stay was filed, this factor weighed in favor of a stay.

(8) *A Stay would have Advanced the Interests of the Public.*

The sixth factor is the interest of the public. The court found this factor neutral because "[i]nterest in the Sandusky and related cases remain high and the

sooner the remaining cases can be resolved, the better." Order and Opinion (8/15/2016) (Ex. R) at p. 8; see also Order and Opinion (11/30/2016) (Ex. C) at p. 12. However, while the public may have an interest in seeing that civil matters concerning Sandusky are litigated in a timely manner, "the public has a greater interest in enforcement of the criminal law." Kaiser, 1997 U.S. Dist. LEXIS 1377, *12; Golden Quality Ice Cream, 87 F.R.D. at 58 (public interest in quick and diligent resolution of antitrust violations through private litigation only weakened when federal government receives indictment and chooses to prosecute criminal antitrust case); In re Plastics Additives Antitrust Litig., No. 03-2038, 2004 U.S. Dist. LEXIS 23989, at *27-28 (E.D. Pa. Nov. 29, 2004). The public's interest in the fair administration of criminal proceedings may be enough to stay an entire civil proceeding, or at least limit the scope of civil discovery. See Kaiser, 1997 U.S. Dist. LEXIS 1377, *15 (citing Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962)).

As recognized by the Court, the civil and criminal cases were well followed by the public. Order and Opinion (8/15/2016) (Ex. R) at p. 8. Allowing the civil trial to proceed risked poisoning the criminal jury pool by allowing McQueary to present his evidence in a well-followed proceeding where it was against the interests of Schultz and Curley to testify and provide their version of events. In addition, certain rulings that were made during trial also could infringe on the

integrity of the criminal trial by influencing the jury pool. For example, the Court found as a matter of law that Curley and Schultz were mandated reporters when that is an issue directly at play in the criminal prosecutions. If this case had been stayed, it would have been unnecessary for this Court to rule on those issues while the criminal trial was pending.

As these matters are of great interest to the public, the Court should have allowed the criminal proceeding to occur first; thereby, permitting the criminal trial to occur without any influence from the rulings, testimony, and verdict from the civil trial. Any prejudice to the civil trial from the criminal trial could have been managed more easily and the University would have had full access to its witnesses. This factor weighed heavily in favor of a stay.

(9) *A Stay would have Advanced the Interest of Non-Parties.*

The final factor is the interests of non-parties. In denying the first stay request, the Court considered the effect of a stay on Curley and Schultz. Order and Opinion (12/20/2012) (Ex. Q) at p. 11-12. The Court found that as to the whistleblower and defamation claims, their interests were irrelevant. Id. at 11. The Court did not address the misrepresentation claim; the claim the Court later conceded included overlap between the civil and criminal proceedings. Id. at pp. 11-12; Order and Opinion (8/15/2016) (Ex. R) at p. 5. In denying the second stay

request, the Court found that no non-party had an interest in this action. Order and Opinion (8/15/2016) (Ex. R) at p. 8. That is not the case.

Curley, Schultz, and Spanier were all non-parties to the litigation with great interest in this case. They all had an interest in not having the jury pool hear evidence about events related to their criminal indictments and render judgment on them before their criminal proceedings. For Curley and Schultz, this prejudice was amplified because they had to choose whether or not to testify at the civil trial. "The dilemma [of whether to testify in a civil actions] for [non-parties] . . . is severe because they face serious penalties in the event of a criminal conviction, and because they are not themselves parties to th[e] civil action." Quality Ice Cream, 87 F.R.D. at 58. They also had an interest in not having a court make a finding that they were mandated reporters, an issue at the time of the civil proceedings which was still the basis of criminal counts against Spanier, Curley and Schultz.[9]

Balancing the factors discussed above, it is clear that they all favor granting a stay. As such, the Court erred by not granting the stay. This alone calls for the

[9] The Court has dismissed the failure to report charges based on the lapsed statute of limitations. See February 1, 2017 Order (Ex. V). However, imagine if the criminal court and its higher burden found that University officials were not mandated reporters after this court had. A stay was necessary to avoid such unjust results.

granting of a new trial and an order staying the new trial until the conclusion of the criminal proceedings.

(10) *To Ensure a Fair Trial, a Stay was Required in this Matter*

As described above, the legal standard for granting a stay was satisfied. Further, the Court's decision not to grant a stay caused the University severe prejudice, justifying a new trial.

The University's inability to contact Curley and Schultz was not a sanction for any misconduct by the University. It was the result of Curley's and Schultz's independent decisions to invoke their constitutional rights. Nonetheless, by forcing the University to move forward without access to key witnesses, the University suffered greater prejudice than most sanctioned litigants. See Jacobs v. Chatwani, 922 A.2d 950, 962 (Pa. Super. 2007) (quoting Smith v. Grab, 705 A.2d 894, 902 (Pa. Super. 1997)) (holding that even when a party has acted improperly, the decision "to preclude the testimony of a witness is a drastic sanction, and it should be done only where the facts of the case make it necessary.") This alone requires a new trial. But the prejudice was compounded by the Court's decision to (1) instruct the jury that it could take an adverse inference from the failure of the University to present Curley and Schultz, even though the University was powerless to compel Curley and Schultz to testify, and (2) *sua sponte* instruct the jury that the jury must consider Curley and Schultz mandated reporters, even

though the failure of Curley and Schultz to testify made it impossible for the Court to properly consider whether their job responsibilities satisfy the statutory criteria for a mandated reporter. Each error alone requires a new trial to cure. The combined effect of each error certainly warrants a new trial.

B. THE COURT IRREPARABLY PREJUDICED THE UNIVERSITY BY INSTRUCTING THE JURY THAT IT COULD MAKE AN ADVERSE INFERENCE AGAINST THE UNIVERSITY BECAUSE SCHULTZ AND CURLEY EXERCISED THEIR RIGHTS UNDER THE FIFTH AMENDMENT

The Supreme Court of the United States has ruled that the "Fifth Amendment does not forbid an adverse inference **against parties to civil actions** when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause.*'" Baxter v. Palmigiano, 425 U.S. 308, 318 (U.S. 1976) (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)) (italics in original, bolding added). The University is unaware of any case law from the Supreme Court of the United States or the Supreme Court of Pennsylvania which specifically considered whether a trial court may provide an adverse inference instruction against a party when, like here, a non-party asserts his protections under the Fifth Amendment.

However, the Supreme Court of Pennsylvania has considered the issue more generally. Over sixty years ago, the Supreme Court of Pennsylvania explained that

"where a witness is equally available to both parties, no unfavorable inference can be asserted by either against the other for failure to call him. . . ." Haas v. Kasnot, 105 A.2d 74, 76 (Pa. 1954) (citing Mosely v. Reading Co., 145 A. 293, 295 (Pa. 1954) (same for documentary evidence)). In Pratt v. Stein, 444 A.2d 674 (Pa. Super. 1982), a physician accused of malpractice asserted that a trial judge erred by failing to instruct the jury that the physician's failure to testify should not serve as proof of his negligence. See id. at 795. The physician argued that an "[adverse] inference does not arise when the witness who does not testify is equally available to either party. This is an accurate statement of the law." Id. at 705, n.51. The court agreed with his recitation of the law, but stated that it did not apply because the physician was a party-witness. Id. The Superior Court later reaffirmed its position that an adverse inference is inappropriate when a non-party is available to either side. See Fitzpatrick v. Philadelphia Newspapers, Inc., 567 A.2d 684 (Pa. Super. 1989) ("The fact that Lame [a party-witness] was available to be called by either side does not bar the application of . . . [an adverse inference], as it would if he were a non-party witness."); Bulman v. Myers, 467 A.2d 1353, 1355-1356 (Pa. Super. 1983) (holding that malpractice plaintiff was not entitled to an adverse inference for the failure of the defendant-dentist to testify because she could have called him as a witness or offered part of his deposition testimony at trial).

The situation considered in Haas, Pratt, and Fitzpatrick presented itself here. Either McQueary or the University could have subpoenaed Curley and Schultz to testify. Despite equal access to the witnesses and the well-developed law of this Commonwealth, the Court issued the following instruction to the jury:

> Now, you will recall that a stipulation was read during the trial with regard to Mr. Curley and Mr. Schultz, and essentially the stipulation read that, if called as witnesses, they would decline to answer certain questions on the grounds that their answers might tend to incriminate them. A person has a constitutional right to remain silent and decline to answer on the grounds that an answer may tend to incriminate him or them. You may, but need not, conclude that the answer would have been adverse to Penn State's interests. So, in the civil law, there is a provision that, if a person is within the control of a party, that the expectation is they would call the party and the party would state whatever it is that the party is going to state. Penn State contends in this case that Mr. Curley and Mr. Schultz are really not within their control, they don't work for them anymore, and that they don't really have the ability to call them. On the other hand, the plaintiff asserts that, if, in fact, the position is that Mr. McQueary did not tell them what he claims that he told them and that conversely he told them that he only saw horseplay, they would have no Fifth Amendment privilege because if they said we only told it was horseplay, they can't get in trouble for that, and the plaintiff wants you to draw the adverse inference that the reason they are not testifying is because, in fact, if they did answer the question, it would be something other than horseplay so that they assert that they're entitled to that adverse inference. You are not required to do that, so you have to ask yourself which party has control over them, and is the drawing of the adverse inference permissible?

> The plaintiff cannot meet his burden of proof based solely on an adverse inference. There has to be other evidence that the plaintiff presented, and you will have to recall what the evidence was that was presented with regard to the misrepresentation count.

N.T. (10/27/2016) at 126:25-128:19. The University properly objected and briefed the issue. See N.T. (10/27/2016) at 126-128; Memorandum (8/26/2016) (Ex. W). Consequently, the Court's instruction ran afoul of Pennsylvania law and the Court committed reversible error when it provided an adverse inference instruction.

The analysis used by other courts also leads to the conclusion that the adverse instruction was inappropriate here. Some courts apply and consider on a case-by-case basis a list of non-exhaustive factors to determine whether an adverse inference instruction is appropriate. See Coquina Investments v. TD Bank, 760 F.3d 1300, 1309-1312 (11th Cir. 2014), (cited in Pa. SSCJI, § 5.51); Libutti v. United States, 107 F.3d 110, 123-124 (2d Cir. 1997). Those factors are (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. Coquina, 760 F.3d at 1311 (quoting LiButti, 107 F.3d at 123-124). "The overarching concern that should guide the admissibility inquiry is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Coquina, 760 F.3d at

1304. "Because the witness cannot be made to explain why the privilege has been invoked, the reliability of the adverse inference drawn from his silence is limited." Id. at 1310.

When considering the first element – the nature of the relevant relationship – the court should examine the relationship "from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be." LiButti, 107 F.3d at 123. Curley and Schultz were not employees of the University at the time they invoked the rights under the Fifth Amendment. Their criminal prosecution and the situation surrounding it were well covered by the press and considered by the public. They are both trying to succeed in the criminal courts and the court of public opinion. No reason has been provided to believe that the University shares a common interest with Curley or Schultz to justify an adverse inference instruction. Similarly, the second factor – the amount of control by the University over the witnesses – weighs against an adverse inference. The employment relationship had long been severed when their rights were invoked. The only allegation of control is that the University continues to pay the legal fees of Curley and Schultz.

The fact that the University has paid the legal fees for Curley and Schultz in the criminal proceedings does not change this analysis; the individual counsel of Curley and Schultz maintain a professional responsibility to act solely in their

clients' best interest. See Bonfilio v. United States, No. 15-1015, 2016 U.S. Dist. LEXIS 145142, at *49 (W.D. Pa. Oct. 20, 2016) (stating "in the context of criminal defense, certain litigation decisions are considered fundamental and are for the client to make . . . includ[ing] decisions on . . . whether to testify . . . ."); Pa.R.P.C. 5.4(c) (mandating that "[a] lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). No evidence suggests that the University controls their defense in anyway including the invocation of their rights under the Fifth Amendment. Further, Curley and Schultz have not cooperated at all in any matter relating to Sandusky's conduct. They provided no information during discovery in this case or during the Freeh Group investigation commissioned by the University. See *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, Freeh Sporkin & Sullivan, LLP (Ex. X) at p. 12. Rather, they declined to participate in the investigation on the advice of their counsel. Id. This is a further sign that the University has no control over them. See LiButti, 107 F.3d at 123 (finding party's payment on non-party's legal fee were relevant when the non-party cooperated in the investigation).

The University continues to pay their legal fees. It does not do so to curry favor with Curley and Schultz. It does not do so as *quid pro quo* for their silence.

It does not do so to induce Curley and Schultz to provide them with information on how they would testify. Rather, it does so to honor its prior agreements with Curley and Schultz.

The third factor – the compatibility of interests – is absent. Curley and Schultz are no longer employed by the University and are not parties in this case. Thus, they have no interest in whether the University prevails in this action.

The fourth and final factor – the role of a non-party witness in the litigation – does not support an adverse-inference instruction in this case. Curley and Schultz each play an important role in this litigation, but that role does not make an adverse inference drawn against the University more reliable. "The overarching concern that should guide the admissibility inquiry is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Coquina, 760 F.3d at 1304. "Because the witness cannot be made to explain why the privilege has been invoked, the reliability of the adverse inference drawn from his silence is limited." Id. at 1310.

Although Curley and Schultz play an important role in this litigation, that important role does not make an adverse inference drawn against the University any more reliable. It does, however, magnify the unfair prejudice to the University of such an inference. This is particularly so in light of the University's lack of authority to compel them to provide information relevant to its defense.

Curley and Schultz were equally available to both parties. The invocation of their Fifth Amendment right was not caused by the University. The University alone was harmed for the actions of others beyond its control. "While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case." Lionti v. Lloyd's Ins. Co., 709 F.2d 237, 246 (3d Cir. 1983) (Stern, dissenting). For these reasons, the adverse inference was inappropriate and the Court should grant a new trial.

C. MCQUEARY IS A PUBLIC FIGURE OR LIMITED-PURPOSE PUBLIC FIGURE AND THE COURT SHOULD HAVE REQUIRED MCQUEARY TO PROVE THAT PRESIDENT SPANIER ACTED WITH ACTUAL MALICE IN MAKING HIS STATEMENTS

The standard of fault in the defamation claim depends on whether the plaintiff is a public or private figure. Am. Future Sys., Inc. v. Better Bus. Bureau, 923 A.2d 389, 400 (Pa. 2007). If the plaintiff is a public figure or public official and the statement relates to a matter of public concern, then the plaintiff must prove the defendant acted with actual malice. Id. Actual malice is a reckless disregard of the truth or falsity of the statement. Id. at 395 n.6; Norton v. Glenn, 860 A.2d 48, 50, n.3 (Pa. 2004).

The actual malice standard also applies to limited-purpose public figures. A limited-purpose public figure "thrusts himself into the vortex of the discussion of pressing public concerns." Rosenblatt v. Baer, 383 U.S. 75, 87 n. 12. (1966). He becomes a limited-purpose public figure because he invites and merits "attention and comment." Gertz v. Welch, 418 U.S. 323, 342 (1974). A person may become a limited-purpose public figure if he attempts to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." Wolston v. Reader's Digest Assoc., 443 U.S. 157, 167 (1979).

McQueary pressed the public-figure standard in his Complaint: "Exhibit C was published by President Spanier with actual malice and/or with reckless disregard for the truth in an outrageous effort to provide full and public support of the University. . . ." See Complaint (Ex. B) at ¶ 53. At a conference on the first day of trial, the Court expressed skepticism about whether McQueary was a public figure, but permitted additional briefing. See N.T. (10/17/2016 (Chambers)) at 4:21-6:16. Consequently, the University supported its position with a bench brief provided to the Court. See Bench Brief (Ex. Y). The University also proposed that the Court provide the jury with defamation instructions consistent with McQueary's Complaint and the alleged defamation of a public figure or limited-purpose public figure. See Proposed Points of Charge (Ex. J) at Nos. 33, 35, 36 &

38. During the charging conference, the Court found that McQueary was not a public figure or limited-purpose public figure at the time of the allegedly defamatory statement. N.T. (10/26/2016 (P.M.)) at 24:10-25:20. Over the University's objections, the jury was not provided the heightened standard attendant to a public figure or limited public figure. This was an error and prejudiced the University.

The two factors that determine whether a plaintiff is a limited-purpose public figure are: (1) whether the allegedly defamatory statement involved a public controversy; and (2) the nature and extent of the plaintiff's involvement in that controversy. Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072, 1077 (3d Cir. 1985) (applying Pennsylvania Law). First and without question, the Sandusky investigation and subsequent proceedings were a matter of public controversy. Second, McQueary had "a major impact on the resolution of a specific public dispute" prior to the defamatory statement when he involved himself in the Sandusky investigation. Wolston, 443 U.S. at 167. On this basis, McQueary qualified at the very least as a limited-purpose public figure.

Courts have found athletic coaches to be limited-purpose public figures. In Sarandrea v. Sharon Herald Co., 30 Pa.D.&C.4th 199 (C.P. Lawrence 1993), the Court considered whether an article in a local newspaper and a promotional poster for that article were defamatory. The crux of the allegations was that two

statements were defamatory: (1) assertions that the National Collegiate Athletic Association (NCAA) inquiry into the recruiting conduct of a former college coach, now a high school coach, was certain, months before the NCAA issued any report on the matter, and (2) an implication that the coach was now involved in suspicious recruiting/school transfer efforts in high school, made at a time when the object of the recruiting drive was not clearly going to transfer. Id. at **10-12. The Court found that "[h]igh school coaches are not immune to the glare of adverse publicity . . . such coaches, and their policies are of as much concern to the community as other public officials and public figures." See id. at *17 (internal citation and quotations omitted). Accordingly, the high school football coach was found to be "a limited public figure and that the actual malice standard is applicable to this case." Id. Similarly, in Basarich v. Rodeghero, 321 N.E.2d 739 (Ill. App. 1974), coaches, teachers, and the teachers' association alleged defamation against publishers of a local newsletter. Id. at 741. The Court found that "coaches and teachers" were "subject to intense public interest and substantial publicity." Id. at 742. Accordingly, the Court found them to be public figures.

McQueary was more of a public figure than local, high school coaches. He testified that he was a successful University quarterback at one of the most followed colleges in America. N.T. (10/21/2016 (A.M.)) at 38:20-38:24. He also served as a graduate assistant coach for Joe Paterno, an iconic coach. See

Complaint (Ex. B) at ¶ 4. If Courts characterize local high school coaches as public figures, certainly McQueary was such a figure as well.

No testimony was provided that Spanier spoke with a reckless disregard of the truth or falsity of the statement or even, at a minimum, "entertained serious doubts about the truth of his publication. . . ." Masson v. New Yorker Magazine, 501 U.S. 496, 510 (1991). McQueary did not prove that President Spanier falsely suggested that McQueary lied about what he saw. The jury instruction improperly lowered McQueary's burden of proof and therefore, the University seeks a new trial.

D. PRESIDENT SPANIER'S STATEMENT WAS A MATTER OF PUBLIC CONCERN; THEREFORE, MCQUEARY MUST SHOW THAT SPANIER ACTED WITH ACTUAL MALICE IN MAKING HIS STATEMENTS

Even if McQueary is considered a private figure, the "actual malice" standard applies if the allegedly defamatory speech was a matter of public concern. See ToDay's Housing v. Times Shamrock Communications, Inc., 21 A.3d 1209 (Pa. Super. 2011); Rubin v. CBS Broad., Inc., No. 01515, 2016 Phila. Ct. Com. Pl. LEXIS 30, at *8 (C.P. Phila. Jan. 20, 2016). When a private figure brings a defamation claim on a matter of public concern, he or she must also prove the element of falsity in addition to the statutory requirements for defamation found in 42 Pa.C.S.A. § 8343(a). Id. See also Krajewski v. Gusoff, 53 A.3d 793, 803 (Pa. Super. 2012) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990)).

The subject of the statement was clearly a matter of public concern. President Spanier's statement concerned his confidence in the actions taken by Schultz and Curley with respect to Sandusky's misconduct. The safety of children and the Sandusky investigation are self-evidently matters of public concern. See Rubin, 2016 Phila. Ct. Com. Pl. LEXIS 30, at *12 (holding sexual misconduct with a student is a matter of public concern). It is also a matter of public concern whether the Commonwealth's largest University and its high-level employees properly dealt with such charges. See id.; N.T. (10/27/2016) at 10:5-12:15.

The University proposed that the Court provide the jury with instructions regarding matters of public concern and the need to show material falsity. See Proposed Points of Charge (Ex. J) at Nos. 33, 35, 36 & 38. The Court declined to provide the jury with those instructions. The University was prejudiced by the Court's ruling that the defamatory statement was not a matter of public concern. McQueary could not have met that burden. See N.T. (10/27/2016) at 9:16-12:18; 15:11-25. Consequently, the University seeks a new trial.

E. THE COURT PREJUDICED THE UNIVERSITY BY REFUSING TO PERMIT THE UNIVERSITY TO PUBLISH TO THE JURY NEWS ARTICLES THAT CAST PLAINTIFF IN A NEGATIVE LIGHT IN ORDER TO REFUTE THE CLAIM THAT THE UNIVERSITY'S ACTIONS HARMED PLAINTIFF'S REPUTATION.

The Court committed an error of law, resulting in prejudice to the University, when it precluded the University from offering the contents of news

articles which cast McQueary's reputation in an extremely negative light ("News Articles"). The University sought to enter these News Articles to defend itself against McQueary's claim that the University's actions or the Spanier Statement, were the cause of McQueary's injured reputation.

On the second day of trial, Mr. Mahon, the University's Vice President for University Relations during the time in question, testified on direct examination that his Office was responsible for monitoring the news media for articles that were being published about the University. N.T. (11/26/16 (P.M.)) at 4-5. During the week that the story of the Sandusky matter broke, the level of press coverage "built during the course of the week as many more reporters showed up in town in person to cover different story angles." Id.

So that this point is clear, up front: the public-at-large was exposed to, and any potential employer of McQueary who did a simple Google-search would find, excoriating content in News Articles published about McQueary[10] during the time period in question, and before the University made the decisions to not allow McQueary to coach and to place him on leave. The contents of two of the News

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[10] These are by no means the only articles critical of Plaintiff published during this timeframe. They are merely examples of the sentiment that existed in the public mind at that time. Mr. Mahon testified that the new coverage during the week in question was "[p]robably the most coverage I've ever seen for a story at Penn State". N.T. (10/26/2016 (A.M.)), 5. He estimated that his department saw "hundreds of stories . . . each day." Id.

Articles which were sought to be introduced into evidence and published to the jury during Mr. Mahon's Day 2 testimony are set forth below. See also List of Articles (Ex. Z) (listing other articles with similar content).

DATE	SOURCE	CONTENT	TRIAL EX. #
11/9/11	*The New York Times*	**Title:** "An Aspiring Coach in the Middle of a Scandal" **Content:** "According to the [Grand Jury] report, McQueary heard 'rhythmic, slapping sounds," which he believed to be those of sexual activity. He walked into his locker, opened it and put his sneakers inside. He then turned his head and looked into the shower. He said under oath that he saw Sandusky raping what appeared to be a 10-year-old boy. He immediately left . . . But there is no evidence that he did anything else to see Sandusky more meaningfully investigated or punished. What he did do was continue to climb up the ranks of Paterno's coaching staff. . . ."	70
11/10/11	*The Washington Post*	**Title:** "Penn State and Joe Paterno: A scandal that could so easily have been avoided" **Content:** "But in 2002, when grad assistant Mike McQueary allegedly walked in on that horrible scene in the showers, on campus,	71

		right there it could have been stopped. That child, and every child that came after, could have been saved. . . . All that it would have taken is a call to 9-1-1. Three little digits. Three little numbers, and that boy's life might have been changed. Other boys' lives might have been changed. Sandusky's life certainly would have changed. And Penn State wouldn't be leaderless this morning. Instead, McQueary left and called . . . his dad. McQueary was not a child, or an 18-year-old freshman. He was a 28-year-old, presumably of good health and strong build. Yet he walked away? When I was 28, I probably still called my dad if I had a perplexing question about my tax return, but if I saw a naked man raping a young boy in the showers, I would have dialed 9-1-1, pulled the man off the boy, incapacitated the man with a well-placed and much-enjoyed knee to the groin, and gotten the boy out of there. Isn't that what anyone in his right mind would do if he saw someone being raped? I certainly hope our world hasn't fallen so far into the Slough of Despond that seeing forcible sex acts performed on a child isn't something we shrug off. This is the sort of thing for which 9-1-1 was invented. But for some reason, McQueary didn't do those things, nor did his father call 9-1-1. Opportunity No. 2, wasted. . . . McQueary was later told, according to the report, that Sandusky's locker room keys had been taken and the incident had been reported to Second Mile. This was opportunity No. 4, in my opinion, because this was McQueary's chance to make the call. It was clear no one had contacted anyone with actual authority. Might McQueary have lost his job? Yes. Is letting a child be raped and doing nothing worth a line on your resume? I would say no. Wouldn't you?"	

In connection with the University's attempt to examine Mr. Mahon on the second day of trial about the News Articles, and to publish the contents of the News Articles to the jury, the Court determined that the News Articles were hearsay – despite the fact that the contents of the News Articles were not being offered for the truth of the matters asserted therein; but, instead, only to prove that the statements in the News Articles, set forth above, were made to the public.

The Court held that it would not let the University publish the contents of the News Articles to the jury because: (a) "the content of" the News Articles that Mr. Mahon was "monitoring" -- "like the proceeding one, The Washington Post article, [is] offer[ing] the opinion of someone who's not here subject to cross-examination[.] I'll let you identify [the News Articles] but not publish [them] to the jury." N.T. (10/18/16 (A.M.)) at 53:16-54:8; (b) the argument that the contents of the News Articles were not being offered for their truth was "splitting a very fine hair, especially in a case like this", Id. at 54:25-55:1; (c) in a jury trial, the fact finder "cannot parse quite as easily the distinction between a statement not offered for the truth of the matter asserted and when offered for the truth of the matter asserted." Id. at 57:24-58:5; (d) the Court was "not going to build in any error for

you later on". Id. at 58:13-14; and (e) it was McQueary's side of the case, and the University was not permitted to enter evidence into the record therein[11].

Then again, on the eight day of trial, the University attempted to recall Mr. Mahon to the stand. After the University's counsel showed one of the News Articles to Mr. Mahon, the Court again refused to allow the University to publish its content to the jury through Mr. Mahon, because: (a) there was "plenty of that in the record already"; (b) "[t]his is the opinion of someone that's writing a magazine article and your saying what he said"; (c) "if this jury hasn't figured out that the news media is accusing [McQueary] of not being a man" they never will and; (d) "we went back and forth so many times [on the issue of the admissibility of the contents of News Articles] that I feel like a fish flopping one way or that other." N.T. (10/26/2016 (P.M.)) at 9:15-10:5.

Despite the University's protest that McQueary was "claiming that his reputation has been injured. This article goes directly to the reputational claim that

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[11] In response, the University reminded the Court that the parties had, for the sake of efficiency, agreed that the University could put on its case with Mr. Mahon, on Plaintiff's side of the case, rather than re-calling him back on the University's side. The Court then stated that the University did not tell it of that agreement. The University then remind the Court that that agreement had been reached in the Court's chambers, with the Court present. The Court indicated it had "no recall of that". Counsel for Plaintiff then confirmed that that agreement had been shared with the Court. The Court responded that Plaintiff's counsel's "memory is better than mine [on] that point, there's no problem. So you can continue to proceed as you have been." N.T. (10/18/2016 (A.M.)) at 59:5-60:6.

he is making. And, I say for a third time, [McQueary's counsel] was permitted" to do exactly what the University sought to do[12], the Court only allowed the University to ask Mr. Mahon "was the media coverage direct to the sexual incident [involving Sandusky] and Mr. McQueary's response to that incident", not to publish the contents of any News Articles – and concluded "[t]hat's the solution that I'm giving you. If I'm wrong, you have the point for appeal." N.T. (10/26/2016 (P.M.)) at 10:6-11:9.

The Supreme Court of Pennsylvania has determined, in the landmark case of Corabi v. Curtis Publishing Co., supra, that, when determining what injury has been done to a defamation plaintiff's reputation, the jury may consider, inter alia, the character and previous general standing of the plaintiff in the community. Corabi, 273 A.2d at 920 (citing Restatement, Torts, Section 621, comment (c) (1938)), overruled on other grounds by Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa. Super. 1982). If the reputation of a defamation-plaintiff is

[12] When *Plaintiff* wanted to examine *his* witnesses about the contents of news articles, the Court determined that the contents of news articles was not hearsay – and could be published to the Jury. See N.T. (10/21/16 (A.M.)), at 74, 75.

"already bad, evidence of this fact is admissible and should be considered in mitigation of damages." Id.[13]

Further, a defamation defendant is permitted to rebut a plaintiff's damages calculation by showing that independent factors harmed plaintiff's economic and reputational standing. Marcone, 754 F.2d at 1079 (holding that newspaper stories concerning plaintiff, other than the publications at issue, were admissible "to mitigate the level of compensatory damages").

The United States Third Circuit Court of Appeals in Wallace v. Media News Group, Inc., 568 Fed. Appx. 121 (3d Cir. 2014), has recently reiterated that the Pennsylvania Supreme Court treats "the issue of a plaintiff's already tarnished reputation as going to damages" because "evidence of a tarnished reputation is admissible and should be considered as a factor to mitigate the level of compensatory damages". Wallace, at 125.

As applied to this case, in order to prove that he was defamed, McQueary was required to not only prove that he had been spoken of falsely, but also that his reputation in the community was lowered as a result. Even if McQueary could

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[13] In the most extreme cases, the "libel-proof plaintiff doctrine" has been extended by Courts in the Commonwealth so far as to preclude even "nominal damages" to a poorly reputed defamation plaintiff – and, even, to necessitate the dismissal of such a "claim with prejudice to avoid the unnecessary costs of defending the claim". Griffin v. Griffin, 2008 Phila. Ct. Com. Pl. LEXIS 300 (2008).

prove that he was spoken of falsely by the University, if he could not prove that those falsehoods were what caused his reputational injury, he was not defamed. As such, a central question attendant to McQueary's defamation action against the University was whether the Spanier Statement was the cause of McQueary's alleged reputational injury.

At its root, McQueary's defamation action contends that McQueary held a good reputation in the community for possessing positive character traits (*e.g.*, honesty, integrity, trustworthiness, bravery, compassion, selflessness, empathy, moral rectitude, *etc.*) and for not possessing negative character traits (*e.g.*, misplaced loyalty, selfishness, cowardice, *etc.*). In his defamation action, McQueary further contends that, after the Spanier Statement was made, and because of that statement's being heard by the community which supposedly previously held him in high regard, that high regard evaporated and was replaced by a newly acquired poor reputation in the community -- which now saw him as possessing negative character traits.

McQueary bore the burden of proving that it was the Spanier Statement that caused this sea-change in public sentiment about McQueary's reputation to occur. If McQueary failed to prove any one of the following, then he could not meet his burden of proving that he was defamed: (a) that he had a good reputation for possessing positive character traits before the Spanier Statement was made; (b) that

he had a poor reputation for possessing negative character traits after the Spanier Statement was made; and (c) that the Spanier Statement caused that shift.

Because of these requirements for proving his defamation claim, there necessarily exists a temporal aspect to McQueary's burden of proof – it not only mattered what McQueary's reputation in the community was, but, also: (a) what become known by the public about McQueary that had nothing to do with the Spanier Statement; and (b) what effect the public's prior possession of that *other knowledge* had on McQueary's reputation.

The University sought to defend against the claims made by McQueary in his defamation action, in part, by proving to the jury that McQueary's reputation in the community for possessing positive character traits was destroyed by his own decision and coverage of that decision by third parties over whom the University had no control – not by the Spanier Statement. The University intended, and was entitled, to attempt to prove to the jury – though its witness Mr. Mahon, who was the very University official in charge of monitoring the public sentiment about the Sandusky affair – that McQueary's reputation was entirely damaged, or else was damaged in large part, by sentiments in the public mind about his character that had nothing to do with the Spanier Statement.

"Hearsay" is a statement that the declarant does not make while testifying at the current trial and that a party offers in evidence to prove the truth of the matter

asserted in the statement. Pa.R.E. 801(c). A "statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. Pa.R.E. 801(a). A "declarant" is a person who makes a statement. Pa.R.E. 801(b). Hearsay is not admissible except as provided by the Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute. Pa.R.E. 802.

The News Articles are statements made by various declarants. As such, the News Articles are hearsay only if they were to be offered in evidence by the University at trial to prove the truth of the matters asserted in the News Articles. See Pa.R.E. 801(c). But, if the News Articles were offered into evidence for a purpose other than to prove the truth of the matters asserted in the News Articles, then the News Articles are not hearsay. Id.

In Raintree Homes, Inc. v. Birkbeck, 2011 Pa.Dist. & Cnty.Dec. LEXIS 164 (2011), affirmed at 2013 Pa.Super. Unpub. LEXIS 1777 (2013), the Court affirmed, in an opinion denying plaintiff's post-trial motion, its decision to permit the defendants to show to the jury a news report about Raintree Homes' poor reputation prior to the statements in question in that case being made about Raintree Homes by Birkbeck (a newspaper reporter for the Pocono Record). Defendants in Raintree Homes argued that the prior news report in question in that case -- a CBS News report which criticized plaintiff's business practices – was

offered "not for the truth of the statements therein – namely, allegations of McQueary's misconduct" but that "the Report was simply offered to establish that the Report was broadcast."

The Raintree Homes Court concluded that "Defendants sought to introduce the [prior CBS News video] to establish [the video's] existence – which would presumably weaken Plaintiffs' claims of economic and reputational damage. And we reiterate that the video was properly shown to the jury because its probative value rested with the fact that . . . Plaintiff's reputation was not harmed solely by Defendants. See Duffy v. Dept. of Transp., 694 A.2d 6, 9 (Pa. Cmwlth. 1997) ('if the out-of-court statement is offered not to prove the truth of the statement made by the out-of-court declarant, but instead to prove that the statement was in fact made, the out-of-court statement is not hearsay regardless of who made it or how it was reported to the witness')." Raintree Homes, at **32-33.

In this case, the University did not seek to offer the contents of the News Articles into evidence through their witness Mr. Mahon (who was the University official most involved with monitoring such articles) on the trial's second day in order to prove that the statements about McQueary's character made in those articles were true. Whether the statements made about McQueary's character in the News Articles were true or not is, in fact, irrelevant. The relevance of the News Articles was to prove what the public was previously told by sources

independent from the University about McQueary (*i.e.*, that McQueary was someone who the public should scorn because the poor choices he made about how to handle witnessing Sandusky in the shower with a child revealed his poor character).

That purpose is a non-hearsay purpose. As such, the Court should have permitted the University to examine its own witness – the person who was most knowledgeable about the News Articles (*i.e.*, Mr. Mahon) -- about those News Articles, and allowed the University to publish to the jury the contents of those News Articles during its examination of Mr. Mahon. The Court's refusal to allow the University to do so, because of its claim that the News Articles were hearsay, constituted a material error of law that warrants a new trial – wherein Mr. Mahon may be examined by the University about the News Articles, and their contents.

Even if the News Articles could somehow be considered hearsay – *i.e.*, because it were to be determined that the University sought to offer the News Articles into evidence through Mr. Mahon to prove the truth of the matters asserted in those articles – the Court nonetheless committed a material error of law by refusing to allow the News Articles to be published to the jury during the testimony of Mr. Mahon, because, alternatively, the University sought to enter the News Articles into evidence, and publish them, through Mr. Mahon for purposes that are exceptions to hearsay under Pa.R.E. 803.

Under Rule 803(21), the following is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: statements dealing with "[a] reputation among a person's associates or in the community concerning the person's character". Under Pa.R.E. 405, character may be proven by either reputational evidence (Rule 405(a)) or by specific instances of conduct if, in a civil case, a person's character or a character trait is an essential element of a claim (Rule 405(b)).

In this civil case, because of the nature of a defamation claim (*i.e.*, that plaintiff's reputation for having a good character was injured), McQueary's character was an essential element of his claim. See e.g. Corabi, supra., at 920 (citing Restatement, Torts, Section 621, comment (c)). The News Articles were statements critical of McQueary which revealed specific instances of McQueary's conduct (*e.g.*, McQueary's conduct on the night that he found Sandusky and the child together in the shower), and which were published to the very public that McQueary claims he was defamed in the mind of by the Spanier Statement.

As the Raintree Homes Court noted, "alternatively, Defendants cite to Pa.R.E. 803(21), which provides that out of court statements showing 'reputation of a person's character among associates or in the community' are excepted from the ban on hearsay testimony". The Raintree Homes Court reasoned:

> We also concluded that the CBS Report is admissible as a hearsay exception pursuant to Rule 803(21) and

> Pennsylvania case law, because the statements in the video pertain to Plaintiffs' claimed damages as a result of Defendants' publications. ***Defendants were permitted to rebut Plaintiffs' damages calculation by showing that independent factors harmed Plaintiffs' economic and reputational standing***. . . . We ***also affirm our decision to permit Defendants to show the CBS Report to the jury on this basis***.

Id. (emphasis added).

The News Articles constituted statements under Pa.R.E. 803(21), made about Plaintiff's "reputation among a [his] associates or in the community concerning the person's character". Accordingly, the News Articles should have been permitted by the Court to be admitted into evidence, and published to the jury, during the testimony of the University's witness, Mr. Mahon, because they constituted excepted hearsay.

In conclusion, the News Articles constituted powerful corroborative evidence in support of the University's defense. The outcome of the trial very likely would have been different if, early on in the trial, the jury would have been permitted to see the contents of the News Articles that supported the University's position that McQueary's reputation was damaged by his own actions and inactions, the highly critical public statements made in the News Articles about those actions and inactions, and the public's reaction to those News Articles – not by the Spanier Statement.

The public was repeated told by third parties who had no connection to the University that McQueary's actions and inactions in dealing with a vulnerable child meant McQueary was of bad character. This evidence is critical to show that something other than the alleged actions of the University caused McQueary's public reputation to suffer.

The Court's ruling was not only an error of law that warrants a new trial, but also an abuse of discretion, and further evidence of the bias against the University that the Court demonstrated throughout these proceedings.[14]

F. THE COURT ERRED WHEN IT HELD THAT IT WOULD TAKE AN ADVERSE INFERENCE AGAINST THE UNIVERSITY WHEN THE UNIVERSITY'S AGENTS ASSERTED THE ATTORNEY-CLIENT PRIVILEGE AT TRIAL.

On the trial's first day, McQueary's counsel asked Lisa Powers, the Director of News and Media Relations for the University, questions about "removing

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[14] Clear-cut evidence of the Court's disparate treatment of the University can be seen in how the Court dealt with news articles that *Plaintiff* wanted to show the Jury several days after the Court had refused to allow the University to publish the contents of the News Articles to the Jury during the testimony of Mr. Mahon. See N.T. (10/21/16 (A.M.)), at 74. When *Plaintiff* wanted to examine *his* witnesses about the contents of news articles, the Court reconsidered its earlier ruling, and determined that the contents of news articles was not hearsay – and could be published to the Jury. *Id.*, at 75. Of course, by that time, Mr. Mahon was off the stand, and the opportunity for the University to establish its defense by providing the Jury with the contents of the News Articles early on in the Trial was gone and could never be recovered.

President Spanier's statement [from the University website] and the attorneys attendant there with legal counsel?" N.T. (10/17/2016 (P.M.)) at 121:13-15. This question was directly related to McQueary's defamation cause of action that was tried to the jury. In response to McQueary's question to Ms. Powers, the University asserted the attorney-client privilege. Id. at 122:13-15. The Court stated: "Then are we going to be – are we going to be revisiting the same issue that there is an adverse inference to be drawn by you invoking the right [of] counsel or is he asking is was there a discussion to withdraw it?" Id. at 123:13-17. The University again asserted the privilege. Id. at 124:15-16. The Court concluded: "Okay. So if you [] assert the privilege then they get the adverse inference? . . . So the adverse inference would be that they were given the chance to withdraw [the Spanier Statement] and they didn't." Id. at 124:17-19, 125:12-14.

Later at trial, in the context of McQueary's whistleblower claim, the Court examined Dr. Rodney Erickson,[15] who followed Spanier as President. The Court asked Erickson the following: "Did you or anyone on behalf of the University reach out to Mr. McQueary and say [McQueary did] the right thing?" Erickson

[15] As an initial matter, "[w]hen the client is a corporation, the privilege extends to communications between its attorney and agents or employees authorized to act on the corporation's behalf." Pa. State Univ. v. Workers' Comp. Appeal Bd. (Sox), 83 A.3d 1081 (Pa. Cmwlth. 2013) (citing In re Condemnation by City of Philadelphia in 16.2626 Acre Area, 981 A.2d 391, 396 (Pa. Cmwlth. 2009)).

answered: "I didn't reach out to him personally. No." The Court then asked Mr. Erickson: "Were you relying on advice of counsel that you take a neutral stance because of the Whistle Blower [sic] Law?" N.T. (10/24/2016 (A.M.)) at 139:11-18. The University's counsel objected on the basis that the Court was asking the witness to disclose privileged information. In response, the Court stated: "Okay. So again, counsel, if you are directing him to take the attorney/client privilege then the Court is going to draw the inference that his response would be negative to the University." Id. at 139:22-140:1. Because of the threat of an adverse inference being taken against it, and because the answer to the Court's leading question was not the answer that the Court clearly expected the witness to give, the University was forced to waive -- for purposes of this question -- the attorney-client privilege, so that the witness could answer that, no, the Whistleblower Law had nothing to do with how Plaintiff was treated. Id. at 139:19-142:6.

In Sprague v. Walter, 516 A.2d 706 (Pa.Super. 1986), the Superior Court noted that, in the context of a defendant's invocation of the Reporter Shield statutory privilege, the trial court had, in effect, exacted "a penalty upon the defendant for its exercise of a statutory right, and tr[ied] to accomplish by indirection what it could not achieve directly. See Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656-57 (1972); Jamerson v. Anderson Newspaper, Inc.,

469 N.E.2d 1243, 1250 (Ind. App.1984)." Sprague, 516 A.2d at 714. The Sprague Court went on to state:

> We mention for edification purposes that it is not the practice in this Commonwealth to resort to the use of an adverse inference to neutralize one's invocation of any of the other statutorily created privileges relating to non-disclosure. See 42 Pa.C.S. § 5923 (Spouses); 42 Pa.C.S. § 5928 (Attorney -- Client); 42 Pa.C.S. § 5929 (Doctor -- Patient); 42 Pa.C.S. § 5943 (Priest -- Penitent).

Id. at fn. 4 (emphasis added).

The stance taken by the Sprague Court squares exactly with the holdings of United States Supreme Court and other Federal cases: a negative inference should not be drawn based upon the assertion of the attorney-client privilege. Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003), superseded by statute on other grounds as recognized by Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 736 F.3d 198, 206 (2d. Cir. 2013); United States v. St. John, 267 F. App'x 17, 22 (2d Cir. 2008). See Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1344-1345 (Fed. Cir. 2004) (citing cases); In re Tudor Associates, Ltd., II, 20 F. 3d 115, 120 (4th Cir. 1994) ("A negative inference should not be drawn from the proper invocation of the attorney-client privilege.").

Here, the Court committed an error of law when it determined that an adverse inference would be taken whenever the University invoked the protection of the attorney-client privilege. The Court's decision is markedly at odds with the

law of the Commonwealth. Invocation of the attorney-client privilege is not a "sanction-able" act; instead, it is an affirmative, statutorily created, right held by litigants.

The Court, by its actions, seeks to make the attorney-client privilege no "privilege" at all. The rule applied by the Court in this case which holds that "every communication between attorney and client must be presumed to be adverse to the client's interest" would eviscerate the privilege.

The "penalty" of an adverse inference exacted by the Court upon the invocation of attorney-client privilege by University officials at trial materially tainted the proceedings in such a way that fundamental fairness requires that a new trial on all claims– wherein no such improperly applied "penalty" is levied – be conducted.

G. THE COURT'S REFUSAL TO PRESENT SPECIAL INTERROGATORIES TO THE JURY CONSTITUTES REVERSIBLE ERROR.

In its pre-trial opinion filed on August 15, 2016, denying the University's second Motion to stay the proceedings, the Court concluded that no stay was needed because: "The use of juror questions on the verdict slip will enable the court to assess and address the impact of Messrs. Curley and Schultz's unavailability on any verdict rendered on the misrepresentation count and take appropriate action, if required." See Order and Opinion (8/15/2016) at p. 5. At

trial, the University prepared and attempted to submit to the Court proposed special interrogatories – dealing with Plaintiff's defamation and misrepresentation claims -- to be used in connection with the Verdict Slip.

Despite what it had concluded earlier about the need for special interrogatories, at trial the Court changed its mind and advised the parties about what the verdict sheet would contain: "I mean, you know, did the Spanier statement defame Mr. McQueary? Yes or no. And depending on that, you get to answer a damage question and then [the] same thing with the misrepresentation. I mean, I don't see it as rocket science and I'm not going to be going down each individual element, do you find this element, do you find that element, you know, I don't think we need to do that." N.T. (10/26/2016 (P.M.)) at 62-63.

Generally, a trial judge in Pennsylvania may grant or refuse a request for special findings on the basis of whether such would add to the logical and reasonable understanding of the issue. Century 21 Heritage Realty, Inc. v. Bair, 563 A.2d 114, 116 (Pa.Super. 1989); Fisch's Parking v. Independence Hall Parking, 638 A.2d 217 (Pa. Super. 1994), petition for allowance of appeal denied, 668 A.2d 1132 (Pa. 1995). When analyzing whether special interrogatories should be presented to the jury, appellate courts "view the charge to the jury in its entirety". Century 21, 563 A.2d at 116 (citing Reilly by Reilly v. SEPTA, 489 A.2d 1291 (Pa. 1985)).

A trial judge's decision to grant or refuse such a request constitutes reversible error when the trial judge commits an abuse of discretion. Willinger v. Mercy Catholic Medical Center, 393 A.2d 1188, 1190 n. 4 (Pa. 1978); Krock v. Chroust, 478 A.2d 1376 (Pa. Super. 1984); Walsh v. Pennsylvania Gas & Water Co., 449 A.2d 573 (Pa. Super. 1982).

It is reversible error for a trial court to refuse special interrogatories in a case where the jury "was presented with two theories upon which [plaintiff] could recover and . . . one of the theories was premised upon trial court error." Century 21, 563 A.2d at 118 (without special interrogatories having been used, "we cannot determine whether the jury's decision was based upon the valid theory . . . or the erroneous theory"). Further, a refusal to provide special instructions to the jury is reversible error where the judge's instructions to the jury did not present the jury with all of the considerations to determine the case. See e.g., Fisch's Parking, 638 A.2d at 223. Requests for submission of special interrogatories to a jury are improperly denied by a trial court if the issues to be decided by the jury are "complex and/or lengthy." See Harsh v. Petroll, 840 A.2d 404, 440 (Pa. Cmwlth. 2003) (citing Moran v. G. & W.H. Corson, Inc., 586 A.2d 416 (Pa. Super. 1991)), petition for allowance of appeal denied, 602 A.2d 860 (Pa. 1992).

Presenting the requested special interrogatories to the jury in this case -- which was complex and long -- would certainly have served to eliminate confusion

in the minds of jurors. The torts of defamation and intentional misrepresentation are not garden variety. They are intricate, multi-factorial, fact-sensitive, torts that involve allegations of non-physical injury to esoteric concepts such as "reputation," involve the application of unique affirmative defenses, complex questions of causation, damages that are not visible, or easily quantifiable – on top of the separate, yet equally complex, questions which surround the concept of punitive damages.

As set forth in the special interrogatories that the University sought to present to the jury with the Verdict Slip, the tort of defamation, as applied to this case, required the jury to make independent determinations about the following:

(a) whether the Spanier Statement was one of "opinion";

(b) whether the Spanier Statement involved a "matter of public concern";

(c) whether the Spanier Statement applied to McQueary;

(d) whether any recipient of the Spanier Statement interpreted it to apply to McQueary, and interpreted it to be defamatory of McQueary;

(e) whether the Spanier Statement was "false", or whether "truth" was a defense;

(f) whether the Spanier Statement had a defamatory meaning – in other words, was a reasonable interpretation of the statement that it meant that McQueary lied to law enforcement or the grand jury;

(g) whether (i) on the one hand, the Spanier Statement "tended to harm the reputation" of McQueary by "lowering him in the estimation of the community" or "deterring third parties from associating or dealing with him" or (ii) on the other hand, factors other than the Spanier Statement "tended to harm the reputation" of McQueary by "lowering him in the estimation of the community" or "deterring third parties from associating or dealing with him";

(h) whether the Spanier Statement was "published" by the University;

(i) whether the Spanier Statement was published with "actual malice";

(j) whether the Spanier Statement caused McQueary to suffer harm to his "reputation" or "ability to earn a living";

(k) the quantification of those compensatory damages, if any, that McQueary proved an entitlement to; and

(l) the quantification of those punitive damages, if any, that McQueary proved an entitlement to.

Interwoven with all of the concepts relevant to the tort of defamation were those relevant to the separate tort of intentional misrepresentation. As further set forth in the special interrogatories that the University sought to present to the jury with the Verdict Slip, that tort required the jury to decide whether or not the statements that McQueary claimed Tim Curley and Gary Schultz made in February, 2001, were in fact made, whether they were "material," whether they were made "falsely or with reckless disregard to whether they were true or false," whether those statements were made "with the intent to mislead Plaintiff into relying upon them," whether McQueary "justifiably and reasonably relied" upon those statements, whether McQueary suffered "harm" as a result of those statements, and the amount of compensatory and punitive damages to which McQueary proved an entitlement. See Affidavit of George Morrison (Ex. K).

Further, the jury was required to determine whether McQueary mitigated his damages by exercising "reasonable diligence" in seeking "substantially comparable employment" after June 30, 2012. Finally, during trial, the jury heard significant evidence from many witnesses, over many days, relevant to claims that it would decide (*i.e.*, defamation, intentional misrepresentation) interspersed with evidence that was only relevant to claims that it would not decide (*i.e.*, the Whistleblower claim).

The presentation of varied recovery theories in this complex case necessarily made it a highly, and unduly, confusing one for the jury. The Court itself noted, in the context of precluding the University from admitting the News Articles, that this was a jury that would have a difficult time merely "parsing the distinction between" a statement offered for a non-hearsay purpose and one offered for a hearsay purpose. See N.T. (10/18/16 (A.M.)) at 58:.2-5. Since the Court denied the University's request to present special interrogatories, it cannot be determined whether the jury's decisions on liability are valid, as well as whether the jury impermissibly awarded duplicative compensatory damages under the multiple claims. It also cannot be determined if the jury awarded punitive damages on proper grounds. Under these circumstances, the Court committed reversible, prejudicial error – and, as such, a new trial is warranted.

H. THE COURT COMMITTED REVERSIBLE ERROR BY ACTING AS A BIASED ADVOCATE FOR PLAINTIFF, AND AGAINST DEFENDANT, DURING TRIAL

A claim that a judge has been partial, biased and/or prejudiced in his conduct towards a litigant "is one of the most serious charges that can be leveled at a judge. The record must clearly show prejudice, bias, capricious disbelief or prejudgment." Nemeth v. Nemeth, 451 A.2d 1384, 1388 (Pa. Super. 1982) (citing In re J.F., 408 A.2d 1382 (Pa. 1979)). Prejudice in a judge is defined as a mental attitude or disposition which sways judgment and renders the judge unable to function

impartially in a particular case. Feingold v. Skipwith, 11 Phila. 20, 1984 Phila. Cty. Rptr. LEXIS 64, 1984 WL 320886 (1984) (citing Black's Law Dictionary, 1061-1062 (5th ed. 1979)).

When a judge's "apparent antagonism towards [a party] is evident from the record," an "appearance of impropriety" rule is used to analyze putatively biased in-court conduct. In re Adoption of L.J.B., 18 A.2d 1098, 1111 (Pa. 2011); see In Interest of Morrow, 583 A.2d 816, 819 (Pa. Super. 1990) (applying impropriety standard to circumstances in which the "lower court judge twice interrupted the testimony of a crucial witness for appellee" and cut short the witness's "ability to complete her testimony for the defense.").

An appearance of impropriety warrants new proceedings before another judge. Joseph v. Scranton Times, L.P., 987 A.2d 633, 634 (Pa. 2009). There is an appearance of impropriety "whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter." Id. (citing In Interest of McFall, 617 A.2d 707, 712-13 (Pa. 1992)). Unlike the rule applied to other kinds of errors warranting a new trial, when appearance of judicial impropriety has been established, no showing of actual prejudice is required to compel recusal and new trial. Scranton Times, 987 A.2d at 634.

It is important for trial courts to remain vigilant of the fact that "[t]he trial judge is not an advocate, but a neutral arbiter interposed between the parties and

their advocates." Commonwealth v. Overby, 809 A.2d 295, 316 (Pa. 2002) Only in certain rare exceptions is the trial judge duty-bound to raise additional arguments on behalf of one party or another such that, if and when the judge fails to do so, he has 'erred.'" Id.

In Commonwealth v. Pachipko, 677 A.2d 1247 (Pa.Super. 1996), the Superior Court held:

> this court has expressed its disapproval when a trial court raises a defense or issue which was not raised by either party. It is clearly inappropriate for a trial court to raise an issue on behalf of a party, thereby acting as an advocate. MacGregor v. Mediq Inc., 395 Pa. Super. 221, 576 A.2d 1123, 1128 (1990); see also Wojciechowski v. Murray, 345 Pa. Super. 138, 142, 497 A.2d 1342, 1344 (1985) (trial court had no authority to employ *sua sponte* Political Subdivision Tort Claims Act as basis for dismissing claim against defendant who had not raised defense).

Pachipko at 1249. See Commonwealth v. Edwards, 637 A.2d 259, 261 (Pa. 1993)) (holding that it is *per se* reversible error if a judge advocates on behalf of a party).

In Edwards, the Supreme Court of Pennsylvania reiterated: "As the U.S. Supreme Court said in Dennis v. United States, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966): In our adversary system, it is enough for judges to judge. The determination of what may be useful to [a litigant] can properly and effectively be made only by an advocate. 384 U.S. at 874-875, 86 S. Ct. at 1851, 16 L. Ed. 2d at 986. Id. In Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2008), the

Supreme Court of Pennsylvania saw fit to again reiterate this admonition of the United States Supreme Court.

Multiple instances exist where the Court acted as an advocate on behalf of McQueary. For example, the Court acted as an advocate on behalf of McQueary when it *sua sponte* instructed the jury that Curley and Schultz held the status of "mandated reporters" – even though McQueary did not seek that instruction and presented no evidence to support it at trial. See also Post-Trial Motion, at ¶¶ 53-67. The Court again acted as an advocate when at several points during the trial it decided, of its own accord, to itself question witnesses in the jury's presence. N.T. (10/17/2016 (A.M.)) at 113:6-113:22; (10/18/2016 (P.M.)) at 141:25-142:18. Other examples include the disparate treatment related to its handling of News Articles, supra, and threatening to provide an adverse inference if a University witness invoked the attorney-client privilege, supra, ignoring its own earlier decision when it decided to deny the University's request to use special interrogatories on the verdict sheet, supra.

Under these circumstances, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court grant judgment notwithstanding the verdict, or alternatively, grant a new trial.

RELIEF REQUESTED

For all the foregoing reasons, the University respectfully requests that the Court grant judgment notwithstanding the verdict in favor of the University or grant a new trial, remit improperly awarded damages, or mold damages consistent with the evidence.

Respectfully submitted,

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 10th day of May 2017, a true and correct copy of the BRIEF IN SUPPORT OF THE UNIVERSITY'S DEFINITIVE MOTION FOR POST-TRIAL RELIEF was served upon the following persons via pre-paid FedEx overnight delivery:

Honorable Thomas G. Gavin
Justice Center, Courtroom 7
201 West Market Street
West Chester, Pennsylvania 19380-0989
Judge

Elliot A. Strokoff, Esquire
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Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By: Nancy Conrad

Nancy Conrad, Esq.

EXHIBIT 1

To Brief in Support of Definitive Motion for Post-Trial Relief

MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	:	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY CIVIL ACTION NO. 2012-1804

AFFIDAVIT OF GEORGE C. MORRISON REGARDING SPECIAL JURY INTERROGATORIES

I, GEORGE C. MORRISON, attorney for The Pennsylvania State University ("University") in the above captioned matter, hereby state and certify the following:

1. On or about October 17, 2016, a jury trial commenced in this matter in Centre County, Pennsylvania.

2. On or about October 26, 2016, counsel for the University requested the opportunity to submit proposed special jury interrogatories to the Court for its review and consideration in advance of jury deliberations.

3. In response to the University's request, the Court indicated that it would only consider a verdict slip that proposed basic questions to the jury, such as "did the Spanier statement defame Mr. McQueary? Yes or no. And depending on

EXHIBIT "K"

that, you get to answer a damage question and then the same thing with misrepresentation." N.T., 10/26/2016, P.M., at 62-63.

4. On or about October 27, 2016, counsel for the University handed the Court a copy of Defendant's Proposed Verdict Slip and Special Interrogatories to the Jury, attached hereto as Exhibit "A" and requested that more detailed inquiries be made of the Jury in this matter consistent with its proposed special interrogatories.

5. The Court declined to entertain the University's Proposed Verdict Slip and Special Interrogatories to the Jury.

6. The Court proceeded to utilize the Verdict Slip as completed by the Jury on October 27, 2016 and filed in this Court on or about October 28, 2016.

The statements set forth above are true and correct to the best of my knowledge, information, and belief. I understand that false statements made by me are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsifications to authorities.

Date: 2/6/17

George C. Morrison

EXHIBIT "A"

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

DEFENDANT'S PROPOSED VERDICT SLIP AND SPECIAL INTERROGATORIES TO THE JURY

AND NOW, this _____ day of October, 2016, we the Jurors empaneled in the above entitled case, find as follows:

AS TO DEFAMATION

QUESTION 1:

Is the Spanier Statement (Exhibit P-38 & D-20) a statement of pure opinion?

Yes _____ No _____

If you answered Question 1 "Yes," you should not answer Questions 2 through 11, and you should proceed to Question 12. Otherwise, please answer Question 2.

QUESTION 2:

Was the subject of the Spanier Statement a matter of public concern?

Yes _____ No _____

If you answered Question 2 "Yes," please answer Question 3. Otherwise, please proceed to Question 4.

QUESTION 3:

Did Plaintiff prove that the Spanier Statement was false?

Yes _____ No _____

If you answered Question 3 "No," then you should not answer Questions 4 through 11, and should proceed to Question 12. Otherwise, please answer Questions 4 through 11.

QUESTION 4:

Did the Spanier Statement tend to harm the reputation of Plaintiff so as to lower him in the estimation of the community or deter third persons from associating or dealing with him?

Yes _____ No _____

QUESTION 5:

Was the Spanier Statement published by the University?

Yes _____ No _____

QUESTION 6:

Did the Spanier Statement apply to Plaintiff?

Yes _____ No _____

QUESTION 7:

Did any actual recipients of the Spanier Statement interpret it to apply to Plaintiff?

Yes _____ No _____

QUESTION 8:

Did any actual recipients of the Spanier Statement interpret it to mean that Plaintiff lied to law enforcement or to the grand jury?

Yes _____ No _____

QUESTION 9:

Did the Spanier Statement cause Plaintiff to suffer harm to his reputation or ability to earn a living?

Yes _____ No _____

QUESTION 10:

Was the Spanier Statement published with actual malice?

Yes _____ No _____

If you answered any of Questions 4 through 10 "No," do not answer Question 11, and proceed to Question 12. Otherwise, please answer Question 11.

QUESTION 11:

State the compensatory damages, if any, to which Plaintiff proved his entitlement.

$ _____

State the punitive damages, if any, to which Plaintiff proved his entitlement.

$ _____

Please proceed to Question 12.

AS TO INTENTIONAL MISREPRESENTATION

QUESTION 12:

Did Tim Curley or Gary Schultz state to Plaintiff during a meeting of those three individuals in the Bryce Jordan Center in February 2001 that they thought this was a serious matter, they would see that it was properly investigated, and appropriate action would be taken?

Yes _____ No _____

If you answered Question 12 "No," then you need not answer Questions 13 through 18 and should proceed to Question 19. Otherwise, please answer Question 13.

QUESTION 13:

Were those statements material?

Yes _____ No _____

If you answered Question 13 "No," then you need not answer Questions 14 through 18 and should proceed to Question 19. Otherwise, please answer Question 14.

QUESTION 14:

Were those statements made falsely or with reckless disregard to whether they were true or false?

Yes _____ No _____

If you answered Question 14 "No," then you need not answer Questions 15 through 18 and should proceed to Question 19. Otherwise, please answer Question 15.

QUESTION 15:

Were those statements, made with the intent to mislead Plaintiff into relying on them?

Yes _____ No _____

If you answered Question 15 "No," then you need not answer Questions 16 through 18 and should proceed to Question 19. Otherwise, please answer Question 16.

QUESTION 16:

Did Plaintiff justifiably and reasonably rely on those statements?

Yes _____ No _____

If you answered Question 16 "No," then you need not answer Questions 17 and 18 and should proceed to Question 19. Otherwise, please answer Question 17.

QUESTION 17:

Did Plaintiff suffer harm because he justifiably relied on those statements?

Yes _____ No _____

If you answered Question 17 "No," then you need not answer Question 18 and should proceed to Question 19. Otherwise, please answer Question 18.

QUESTION 18:

State the amount of compensatory damages, if any, to which Plaintiff proved his entitlement.

$ _____

State the amount of special or punitive damages, if any, to which Plaintiff proved his entitlement.

$ _____

Regardless of this answer, please answer Questions 19 and 20.

AS TO MITIGATION OF ANY DAMAGES:

QUESTION 19:

Were substantially comparable employment positions available after the conclusion of Plaintiff's appointment with Defendant on June 30, 2012?

Yes _____ No _____

QUESTION 20:

Did Plaintiff exercise reasonable diligence in seeking substantially comparable employment?

Yes _____ No _____

The above answers represent the deliberate conclusion of the following:

Each juror concurring in the foregoing answers and verdict should initial below, and the Foreperson should sign and date the form when complete. When the form is complete and signed, please inform the Court.

1) _____ 2) _____

3) _____ 4) _____

5) _____ 6) _____

7) _____ 8) _____

9) _____ 10) _____

11) _____ 12) _____

Date:_____, 2016

_____
Foreperson

CHASEJ

12:20:55
EX 2 - Bailets.pdf

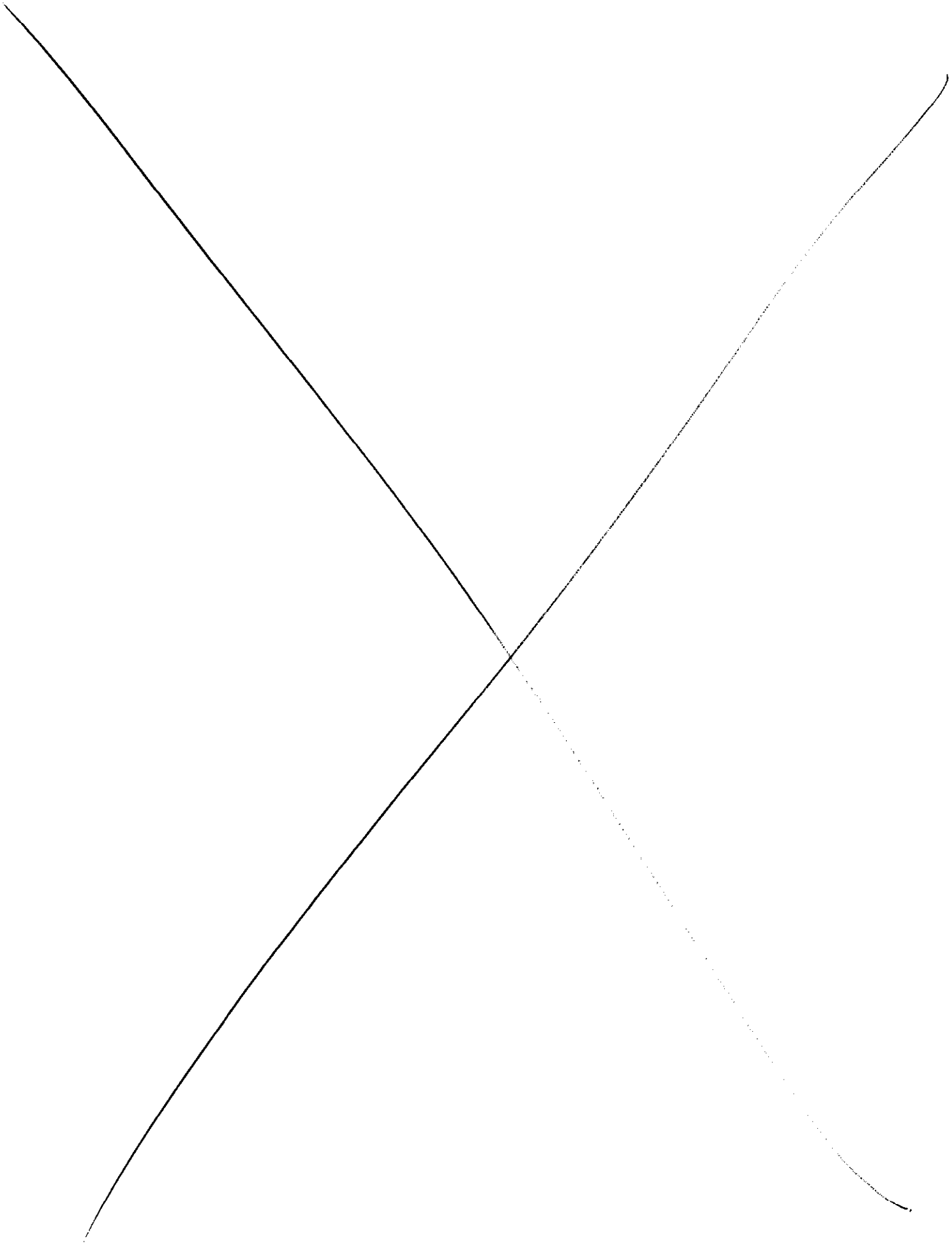

EXHIBIT 2

To Brief in Support of Definitive Motion for Post-Trial Relief

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph M. Bailets, Petitioner	:	No. 265 M.D. 2009
v.	:	
Pennsylvania Turnpike Commission, Anthony Q. Maun, (Director of Accounting), and Nikolaus H. Grieshaber, (Chief Financial Officer), Respondents	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 6, 2016

This opinion is written in support of this court's June 29, 2016, order entering a verdict in favor of Ralph M. Bailets and against the Pennsylvania Turnpike Commission (Commission) in response to the complaint filed by Bailets, seeking relief under the Whistleblower Law (Law),[1] 43 P.S. §§1421-1428. We concluded that Bailets met his burden of proving that he was discharged from the Commission in retaliation for reporting instances of wrongdoing and waste to Commission employees Anthony Q. Maun and Nikolaus H. Grieshaber.[2]

[1] Act of December 12, 1986, P.L. 1559.

[2] On May 6, 2016, the parties filed a stipulation of discontinuance as to Maun and Grieshaber.

Section 3(a) of the Law, 43 P.S. §1423(a), provides that an employer may not discharge a public employee for making a good faith report of wrongdoing or waste.[3] Section 4 of the "Law provides a civil cause of action to employees" of a public body for violations of the Law. *Evans v. Thomas Jefferson University*, 81 A.3d 1062, 1064 (Pa. Cmwlth. 2013). To prove a *prima facie* case of reprisal, an employee must show by a preponderance of the evidence, that prior to the alleged retaliation, he made a good faith report of wrongdoing or waste. *O'Rourke v. Department of Corrections*, 778 A.2d 1194, 1200 (Pa. 2001). Here, the evidence establishes that Bailets has met his initial burden.

Based on the testimony and evidence presented during four days of non-jury trial, this court finds the following facts. Bailets worked for the Commission from 1998 to November 20, 2008. (Ex. 3.) For the majority of this time, Bailets held the position of manager of financial reporting and systems, which required him to ensure that financial reports were produced in a timely and accurate fashion. (N.T., 5/23/16, at 53.) His duties included reviewing certain requests for proposals (RFP). (*Id.* at 63.) In addition to his regular job, Bailets had also performed the duties of the acting assistant secretary treasurer. (*Id.* at 154-56.) The Commission issued an RFP seeking bids for the creation of a computerized financial reporting system. The Commission awarded Ciber, Inc. (Ciber) the initial contract (first contract) for $3.4 million.

[3] Section 2 of the Law defines "waste" as "conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth" sources. 43 P.S. §1422. It defines "wrongdoing" as a "violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation . . . or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.*

Subsequently, the Commission issued an RFP seeking bids for a contract to implement the computerized financial reporting system (second contract). Bailets assisted Maun in evaluating the proposals. (N.T., 5/25/16, at 548.) In December 2004, Bailets informed his supervisor, Maun, the Commission's director of accounting, that it would be improper to permit Ciber to bid on the second contract because Ciber had been awarded the first contract and, therefore, had an unfair advantage because it had possession and access to documents that other bidders would not. (N.T., 5/23/16, at 197-98; N.T., 5/25/16, at 543, 547.) Maun told Bailets not to make waves with respect to Ciber and that his job could be in jeopardy as a result.[4] (N.T., 5/23/16, at 66, 191; N.T., 5/24/16, at 222.) Nevertheless, Maun told Bailets that he would talk to then Chief Financial Officer (CFO) Blair Fishburn[5] about Bailets' concern to "get his thoughts and direction." (N.T., 5/25/16, at 547; N.T., 5/23/16, at 210.) Thereafter, Maun raised the matter with CFO Fishburn. (N.T. 5/25/16, at 547.) Maun also told Bailets that he would make the group evaluating the proposals aware of Bailets' concerns. (N.T., 5/23/16, at 211.) The evaluation group included, among others, Fishburn, Maun, and Grieshaber.[6] Their evaluation report of the bidders for the second contract questioned whether Ciber's previous relationship with the Commission created a conflict of interest or provided Ciber an unfair advantage. (Ex. 119 at 7.)

[4] Maun did not deny making the statements; instead, he testified that he did not recall making them. (N.T., 5/25/16, at 626-29.)

[5] Fishburn was the Commission's CFO until June 2008, when he was replaced by Grieshaber. (N.T., 5/23/16, at 210; N.T., 5/26/16, at 822.)

[6] At that time, Grieshaber was the director of treasury management.

In February 2006, the Commission awarded Ciber the second contract for $58.3 million.[7] (Ex. 61.) Bailets was directed to learn how to configure the new system, how the new system worked, and how to maintain the system after the Ciber consultants were gone. (N.T., 5/23/16, at 15.) This would be accomplished through knowledge transfer[8] from Ciber's consultants to Bailets. (*Id.*)

Throughout the implementation of the new system, there was high consultant turnover and excessive absenteeism, which caused rework and delays. (*Id.* at 16.) Ciber did not have the proper consultants on-site, and knowledge transfer was not occurring. (*Id.*) Bailets regularly informed Maun of Ciber's deficiencies verbally, at project team meetings, and via emails. (*Id.* at 17; N.T., 5/25/16, at 556.) Whenever Bailets raised issues about Ciber, Maun "would move the issues forward," routinely raising them to the CFO, other management officials, and Ciber officials. (N.T., 5/25/16, at 559-60.)

On March 1, 2007, Bailets sent Maun an email asking him to make management aware that, because of Ciber's shortcomings, the finance team was behind schedule and that knowledge transfer from Ciber to Bailets' team was not forthcoming. (Exs. 9, 19.) Maun responded, thanking Bailets for the update and telling Bailets that he has been keeping CFO Fishburn in the loop. (*Id.*) In a follow-

[7] In its lawsuit against Ciber filed in 2012, the Commission acknowledged that it entered this contract knowing that Ciber had presented "the highest offer by far." (Ex. 36EE, ¶226.)

[8] Bailets defined "knowledge transfer" as the act of "imparting the knowledge on a technical resource to understanding how it works and how to fix it when it does not work. (N.T., 5/23/16, at 68.) He further explained that the "tracking of the deliverable of knowledge transfer was supposed to be measured and marked with . . . a capability transfer form," which was a plan for each Commission employee so that they would know "what skills they were to be obtaining, and it would measure them . . . on a quarterly basis how they were [progressing] in assimilating those skills." (*Id.* at 77.)

up email on March 2, 2007, Bailets told Maun "One more thing . . . not only should Blair [Fishburn] and senior management be aware that [Commission] resources are not part of the problem, we are solving the problem that was created by our $60M vendor [Ciber]." (*Id.*)

On March 6, 2007, Bailets sent an email to Maun stating that Ciber needed to get the right people on site, and that the Ciber team had been understaffed for months and was working in areas in which they had little expertise. (Ex. 11.) Bailets sought assurance that "[Ciber] will be delivering what was promised." (*Id.*) On March 8, 2007, Bailets sent Maun a follow-up email, explaining that he encountered problems due to the lack of configuration in the module and that "lack of Ciber resources was the problem." (Ex. 12.) Bailets reiterated that knowledge transfer was not occurring effectively and efficiently. (*Id.*)

On March 16, 2007, Bailets sent Maun an email stating that his own work was on hold pending configuration from a Ciber consultant. (Ex. 13.) Bailets asked, "'When will some knowledge transfer occur?' We are all learning on our own over 90% of the time." (*Id.*) On March 19, 2007, Bailets sent Maun an email stating that Ciber consultants were absent and he did not know if, or when, they would come to work that week. (*Id.*) On March 22, 2007, Bailets sent Maun an email suggesting that an upcoming status meeting should include a discussion about requesting a formal plan regarding when and how Ciber will effect the knowledge transfer. (Ex. 72.) In another email to Maun on March 22, 2007, Bailets complained about Ciber's lack of preparation on a business review demonstration. (Ex. 14; N.T., 5/23/16, at 73.) On May 4, 2007, Bailets sent Maun an email voicing his concern about Ciber's

lack of a plan for knowledge transfer and noting that Ciber consultants were nonresponsive when questioned about knowledge transfer. (Ex. 16.)

On June 29, 2007, Bailets sent Maun an email reporting his observations after a team meeting. (Ex. 8.) Bailets stated that knowledge transfer "remains a hit or miss deliverable," (*id.*) meaning that Ciber had no plan regarding how the knowledge transfer was to occur. (N.T., 5/23/16, at 71.) Bailets again complained about Ciber's staffing inadequacies, including absenteeism, vacant positions, and consultants unable to perform their jobs.[9] (Ex. 8)

On July 27, 2007, Bailets sent Maun an email stating, "I don't want to be the one *blowing the whistle* on this but . . . ." (Ex. 20 (emphasis added).) Bailets testified that he said that he did not want to be the one blowing the whistle because "Mr. Maun had already indicated on many, many occasions that I shouldn't be messing with Ciber and I shouldn't be bringing up problems." (N.T., 5/23/16, at 76.) In the email, Bailets then informed Maun that testing had been performed by two Ciber consultants and that best practices required that testing be performed by at least one client source to avoid a conflict of interest. (*Id.*) Maun responded that he discussed the issue with Randy Mellinger[10] "*but I didn't give you up.*" (*Id.*) (emphasis added.) Maun acknowledged that Bailets' concern was a "big deal" and that the general rule was to always have a Commission employee present. (N.T.,

[9] Bailets testified that he reported Ciber's waste and wrongdoing because he had a fiduciary duty to do so to ensure that the Commission was getting what it had paid for from Ciber. (N.T., 5/23/16, at 191.) Additionally, Bailets explained that he did not want to appear complicit in Ciber's wrongdoing by his silence. (*Id.*)

[10] Mellinger was a manager of the internal audit department. (N.T., 5/25/16, at 644.)

5/25/16, at 630, 644); yet, Maun did not follow up on the issue when he did not get a response from Mellinger. (*Id.* at 645.)

On October 3, 2007, Bailets sent Maun an email stating that knowledge transfer from Ciber was still not forthcoming, and that "in the future if a costly maintenance contract is required from a third party vendor it will not be due to the ineffectiveness of assigned [Commission] resources. It will be due to the lack of consultant performance in delivering any meaningful knowledge transfer." (Ex. 17.)

On June 13, 2008, Dennis Miller, Ciber's vice-president, sent an email to George Hatalowich, the Commission's Chief Operating Officer (COO), stating: "For my own selfish reasons I want Tony [Maun] to know that I am speaking for you and Joe [Brimmeier][11] when it comes to his project." Miller explained that, since the computer system had been implemented in the finance department on March 3, 2008, "you and the Commissioners have not seen a single financial report . . . I am actively being proactive to head-off any complaints by commissioners that might question why in the world a '58 million dollar system can't produce reports in a timely manner.' Of course I know they have not asked me for them, I am thinking farther ahead then [sic] my nose, obviously a foreign concept to Tony [Maun]." (Ex. 32.) Miller further stated "I fully realize we are in a delicate position with Nik [Grieshaber] just taking over and we cannot afford to push Tony [Maun] out of the organization." (*Id.*)

[11] Brimmeier was the Commission's Chief Executive Officer (CEO). (N.T., 5/26/16, at 764.)

On August 1, 2008, pursuant to a March 2008 RFP, the Commission entered into a $19.7 million contract with Ciber for knowledge transfer (third contract). (Ex. 36NN.) Ten months earlier, Bailets had warned Maun of the inevitability of a third contract due to Ciber's lack of "performance in delivering any meaningful knowledge transfer." (Ex. 17.)

Bailets not only reported Ciber's wrongdoing to Maun, he also made Grieshaber aware of the problems with Ciber. Bailets testified that, before Grieshaber became CFO in June of 2008, they discussed Ciber on a weekly basis. (N.T., 5/23/16, at 81.) Bailets reported the conflict of interest issue to Grieshaber in approximately January 2005. (N.T., 5/24/16, at 220.) At that time, Grieshaber was the director of treasury management and Bailets' co-worker. (N.T., 5/23/16, at 80, 186; N.T., 5/25/16, at 671-72.) During those conversations, Grieshaber told Bailets to tread lightly (N.T., 5/23/16, at 81-82) and that when he, Grieshaber, complained about Ciber, Grieshaber had been rebuked. (*Id.* at 82.)

In June 2008, Grieshaber replaced Fishburn as CFO. (N.T., 5/25/16, at 682). After Grieshaber became CFO, Bailets continued to complain about Ciber's performance to his immediate supervisor, Maun, who now reported directly to Grieshaber. Bailets testified that, after Grieshaber became CFO, their previously friendly relationship changed. (*Id.* at 52.) Grieshaber's attitude and demeanor towards Bailets changed; he stopped engaging in conversations with Bailets. (*Id.* at 120.)

On June 17, 2008, CFO Grieshaber sent an email to COO Hatalowich, stating that "[w]hile I have a lot of misgivings about Ralph Bailets I think he may be helpful for Purchasing on a temporary basis *as long as we keep a short leash on him*." (Ex. 137 (emphasis added).) Two days later, Hatalowich forwarded Grieshaber's email to Ciber's vice president Miller, who later that same day responded that he supported the moves that Grieshaber described, i.e., moving Bailets to the purchasing department. (Ex. 137.)

On or about July 2, 2008, Grieshaber moved Bailets to the purchasing department. (Ex. 84; N.T., 5/25/16, at 684.) Grieshaber made the decision to move Bailets without input from Maun, Bailets' immediate supervisor. (N.T., 5/25/16, at 575, 634.) However, he did have input from COO Hatalowich and Ciber's vice president Miller. (Ex. 137.)

Additionally, on or about July 11, 2008, without prior notice or explanation to Bailets, CFO Grieshaber removed Bailets from his position as acting assistant secretary treasurer, which he had held for 10 years, without additional compensation. (Ex. 33.) However, the position, which involved preparation for, and participation at, Commission meetings, had given Bailets some status within the organization, and his service in the position was reflected on his performance evaluations. (N.T., 5/23/16, at 156.) Again, Grieshaber made this decision without consulting Maun, Bailets' immediate supervisor, but with the concurrence of COO Hatalowich and CEO Brimmeier. (*Id.* at 153-57; N.T. 5/25/16 at 692.)

In early November 2008, CEO Brimmeier announced, in response to the "economic realities of 2008," a voluntary departure program providing incentives to staff interested in leaving their employment and asked each department head to reduce operating expenses. (Ex. 129.) In an email to employees on November 14, 2008, Brimmeier stated that he hoped that the program, along with other cost-saving measures,[12] would eliminate or minimize the need for an involuntary reduction in force. He chastised employees for "gossiping and spreading rumors," adding that management was considering constructive ideas of how the Commission could save money. (*Id.*)

On November 20, 2008, a member of the human resources department handed Bailets a letter, informing him that his position as manager of financial reporting and systems was "being eliminated due to budgetary reasons." (Ex. 35.) Bailets was then escorted out of the building with his belongings in a box, in a manner similar to the way the Commission dealt with employees who had been terminated for theft or violent behavior. (N.T., 5/23/16, at 190; N.T., 5/26/16, at 836, 874.)

The Commission's decision to terminate Bailets' employment was based on CFO Grieshaber's recommendation. (N.T., 5/26/16, at 823.) Of the 15 employees that the Commission terminated, Grieshaber personally recommended two. (N.T., 5/25/16, at 638, 732.) At that time, Grieshaber oversaw six different departments, comprising 75 employees. (*Id.* at 672-73, 727.) Yet, the only two employees he

[12] Bailets had previously raised the following two additional financial concerns to Maun: (1) the excessive number of Commission investment fund managers and (2) the E-Z pass commercial volume discount program that small companies were taking advantage of, by bundling together to obtain the 20% discount and then reselling the passes for a profit. (N.T., 5/23/16, at 175-80.)

recommended for termination were Bailets and another employee who also reported to Maun. (*Id.* at 583, 614.)

Although Maun was director of the department and Bailets' immediate supervisor, Grieshaber decided to fire Bailets without consulting Maun. (*Id.* at 583, 614.) The failure to consult Maun was particularly disturbing because CEO Brimmeier testified that he had asked the director of each department to make a list of their employees that were subject to layoff. (N.T., 5/26/16, at 821.) He told the department directors to base their decisions on "information and input from their staff members." (*Id.* at 822.) He explained that the department directors were to obtain input from their staff "where we could make cuts." (*Id.* at 824.) Despite the fact that Maun was the department director in Bailets' department, Brimmeier instructed Grieshaber to make the decision for Maun's department. (*Id.* at 823.)

Before informing Maun that Bailets would be fired, Grieshaber, however, told CEO Brimmeier and COO Hatalowich. (N.T., 5/25/16, at 698, 733.) In deciding to fire Bailets, Grieshaber failed to consider Bailets' recent outstanding performance evaluation ending June 30, 2008, given by Maun and reviewed by Grieshaber. (*Id.* at 730, 743.) Commissioner Pasqual Deon stated that the Commission simply ratified the termination without asking any questions.[13] (N.T., 5/24/16, at 465.) Grieshaber's termination of Bailets occurred just five months after Grieshaber told COO Hatalowich that Bailets needed to be kept on a short leash.

[13] The parties stipulated that, if called to testify, Commissioner Deon would testify as stated above and that the Commissioners had no involvement in selecting the chosen employees. (N.T. 5/24/16, at 465.)

When Grieshaber became CFO in June of 2008, he focused on incrementally decreasing Bailets' influence in the Commission – first transferring Bailets to the purchasing department, then removing his assistant secretary/treasurer duties and finally firing him. The above evidence amply supports this court's determination that Bailets reported wrongdoing and waste to the Commission before his termination.

Two subsequent developments that are part of the record leave no doubt that the matters that Bailets complained of to the Commission constituted wrongdoing and waste. First, a report prepared by Phoenix Business, Inc. (Phoenix Report)[14] found that it "is highly unusual" for an organization to select the firm that developed the RFP for software to implement the project in a subsequent contract because of the possibility of an unfair advantage. (Ex. 136, at 4.) The Phoenix Report concluded that the $58.3 million cost of the second contract with Ciber for implementation was "extremely high" and that the contract should have cost only $10 to $15 million. (*Id.*) That report found that the implementation program "faced numerous issues including high consultant turnover, poor project management, insufficient guidance to the [Commission] and lack of appropriate skill and knowledge from the implementation consulting staff." (*Id.*) Those were the same concerns Bailets had repeatedly raised before he was fired.

Second, four years after Bailets' termination, the Commission acknowledged that waste had occurred with respect to Ciber, when it filed a lawsuit

[14] The Commission received the final Phoenix Report in February of 2014; however, the Commission received a draft of the report at the end of 2013. (N.T., 5/24/16, at 473.)

against Ciber and Ciber's vice president Miller on August 31, 2012, seeking $45 million for, *inter alia*, breach of contract and violations of the Commonwealth Procurement Code,[15] 62 Pa. C.S. §§101-4509. (Ex. 36EE, at ¶5.) The amended complaint alleged that no knowledge transfer occurred in the second contract, that consultant turnover and absenteeism were high, that consultants were not qualified, and that systems were not delivered. (*Id.* at Count IV.) Those allegations mirror the complaints Bailets regularly and continuously made to Maun from 2004 to November 2008. They involve a substantial misuse or loss of Commonwealth funds or resources and raise serious ethical concerns.

Although the Commission conceded waste and wrongdoing with respect to the Ciber contracts, the Commission argued that Bailets did not establish a causal connection between his reports of waste and wrongdoing and his termination. Our Supreme Court has stated that, under the Law, a claimant "must come forward with some evidence of a connection between the report of wrongdoing and the alleged retaliatory acts." *O'Rourke*, 778 A.2d at 1200.

Bailets credibly testified that, whenever he voiced his concerns about Ciber's performance to Maun, Maun consistently told him "you're stepping on a hornet's nest here . . .; you're making waves" and "Mr. Miller is very powerful with respect to his relationships with Mr. Hatalowich and Mr. Mesaric."[16] (N/T., 5/23/16,

[15] Act of May 15, 1998, P.L. 358.

[16] Jeffrey Mesaric was the head of the Commission's information technology department. (N.T., 5/26/16, at 810.) Bailets also raised his concerns about Ciber directly to Mesaric during meetings. (N.T., 5/23/16, at 111.) The Commission has acknowledged that Ciber's vice-president had a "personal relationship" with Mesaric. (Ex. 36EE, ¶223.) *See also* (N.T., 5/23/16, at 107.) The Commission has acknowledged that Ciber's vice president was criminally charged for his **(Footnote continued on next page...)**

at 80.) Maun warned Bailets on at least 15 occasions that Miller was powerful in his relationship with Hatalowich and that Bailets "needed to be careful." (*Id.*) Bailets testified that his oral complaints to Maun continued until the week of his termination. (*Id.* at 28.) Grieshaber also told Bailets to tread lightly with Ciber. (*Id.* at 82-82.) The evidence shows that Bailets was warned time and again by Maun and at least once by Grieshaber to tread lightly and not make waves regarding Ciber.

The Commission nonetheless argues that Bailets has failed to show the required causal connection because Bailets was offered a position in another department and Bailets' complaints in 2004 were too remote from his termination in 2008. We disagree.

First, we consider the Commission's claim that Maun and Grieshaber did not retaliate against Bailets for his reports of wrongdoing and, in fact, offered Bailets a position in another department. However, the testimony of Maun and Grieshaber belied that argument. A specific job was never offered, no salary was discussed, and both Maun and Grieshaber admitted that Bailets was not informed that he would be terminated if he did not accept the "nebulous, conceptual" position. (N.T., 5/26/16, at 918; N.T., 5/25/16, at 703, 750.)

Next, we consider the Commission's claim that Bailets' complaints in 2004 were too remote from his termination in 2008. Although Bailets' complaints

(continued...)

conduct on this contract but that he "entered into the ARD Program (all charges, including restricted activities seeking improper influence, bid rigging and theft, to be withdrawn upon successful completion of the program)." (Ex. 36EE, ¶229.)

about Ciber began in 2004, they did not end in 2004. Bailets, verbally and through email communication, reported the waste and wrongdoing associated with the Ciber contracts regularly and continuously from 2004 until his termination in November 2008.

Bailets has produced evidence of a connection between his reports of waste and wrongdoing and his termination. Under the Law, the burden then shifted to the Commission to rebut Bailets' charges pursuant to section 4(c) of the Law, which states that an employer may defend by proving that its action against the employee "occurred for separate and legitimate reasons, which are not merely pretextual." 43 P.S. §1424(c). To successfully rebut a *prima facie* case of reprisal, "the employer must prove that it would have taken the same adverse employment action absent the employee's good-faith report of wrongdoing." *O'Rourke*, 778 A.2d at 1204. Thus, in this case, the Commission bears the burden of proving that it would have fired Bailets even absent his reports of waste and wrongdoing. The Commission has failed to meet that burden.

Here, the Commission argued that, because of an unprecedented decline in turnpike revenue, it fired Bailets and 14 other employees for budgetary reasons. This court was not persuaded for the following reasons.

First, there was no budget crisis necessitating the employee layoffs. Theodore Rusenko, the current manager of accounting and financial reporting, was supervisor of the Commission's budget department in 2008. (N.T., 5/24/16, at 400, 406, 415.) He testified that there was no budget crisis. (*Id.* at 401, 445-46, 456.)

The Commission makes much of the fact that the Commission's expenses more than doubled between 2007 and 2008. However, Rusenko credibly testified that the increase was the result of Act 44[17], which took effect in 2008 and required the Commission to pay $750 million per year to the Pennsylvania Department of Transportation for turnpike maintenance. (*Id.* at 441, 453, 459.) However, the Act 44 payments were met by the Commission borrowing that money, as well as by a 25 percent system-wide toll increase in January 2009.[18] (*Id.* at 433, 445.) Moreover, from June 1, 2007 to May 31, 2008, there were 4 million more vehicles travelling the turnpike. (*Id.* at 437.) Additionally, the Commission's traffic and revenue consultant's projections in 2008 did not find any looming budget crisis. (*Id.* at 447, 449.) Significantly, Rusenko concluded that the elimination of 15 jobs would not have any impact on the budget. (*Id.* at 461.)

Second, events that occurred after Bailets' termination lend support to the conclusion that the Commission's purported reason for terminating Bailets' employment was pretextual. Despite the Commission's claim that it terminated Bailets and 14 other employees for budgetary reasons, on December 5, 2008, 15 days after the terminations, certain employees in the finance department were reclassified and received pay raises. (Ex. 139.)

Moreover, after the Commission terminated Bailets, Bailets sent a letter to the director of the human resources department, asking how the Commission

[17] Act of July 18, 2007, P.L. 169, No. 44, 75 Pa. C.S. §8901.

[18] In November of 2008, before Bailets was terminated, it was well known at the Commission that there would be a toll increase in January 2009.

would consider the laid off workers for rehire for future vacancies. (N.T., 5/23/16, at 166, 169.) The director responded, by sending Bailets an employment application. (*Id.* at 169.) Although the Commission hired four new employees in the six month period after it fired Bailets (Ex. 41; N.T., 5/26/16, at 858, 869) and hired a manager of treasury operations (N.T., 5/26/16, at 862), the Commission failed to consider Bailets for any of the vacancies. In July 2009, Bailets applied for the job of manager of finance which had become vacant due to the incumbent's retirement, as well as a strategic manager position, but received no response. (*Id.* at 170-71.)

In October 2008, when Grieshaber and CEO Brimmeier were purportedly trying to reduce operating expenses to avoid employee layoffs, Brimmeier ordered Patricia Raskauskas, who was manager of workers' compensation claims for the Commission, to meet with and hire an outside person for a position in her department. Raskauskas had previously told Brimmeier and Grieshaber that her department did not need to fill that position and that she did not have anything for that person to do. (N.T., 5/24/16, 370-71, 373.) When she told Grieshaber again that it was not necessary to fill that position because she did not have anything for the person to do, Grieshaber instructed her "to find something for her to do." (*Id.* at 373.) On December 1, 2008, just 11 days after Bailets was fired, that person was hired.[19] (Ex. 41; N.T., 5/24/16, at 375.) Moreover, Raskauskas testified that, in order to make a position for Brimmeier's candidate, it was necessary to promote and increase the salary of an employee who had been performing poorly in his position. (N.T., 5/24/16, at 376.)

[19] During the time she was employed, she told Raskauskas that she did not have enough work to do. (N.T., 5/24/16, at 374.) She resigned approximately 15 months later, telling Raskauskas that she was bored with the job. (*Id.*)

Another example occurred in Maun's department. Sharon Jones, a former employee of the Commission who worked in Maun's department, testified about a vacancy for a credit and collections supervisor that she had initiated. (*Id.* at 392, 394.) She explained that the usual procedures for interviewing and hiring candidates were not followed for that vacancy, but instead that Maun and Grieshaber directed her to hire a particular outside candidate who did not have skills relevant to the position. On May 8, 2009, that candidate was hired and then terminated less than six months later due to poor performance. (Ex. 41; N.T., 5/24/16, at 392-93.)

Third, Bailets had consistently received high ratings on his performance evaluations. (Ex. 3.) In his most recent performance evaluation for the period July 1, 2007, to June 30, 2008, Bailets received two outstanding ratings and five commendable ratings. Maun signed that evaluation, and Grieshaber concurred in it as reviewer, just three months before Bailets' termination. (*Id.*) CEO Brimmeier had made it clear to Grieshaber that the less effective, less productive employees "should be looked at first" to be laid off. (N.T., 5/26/16, at 778.) Firing Bailets for purported budget reasons, without first considering his performance, was inconsistent with COO Hatalowich's email to employees, promising to do "our best to make sure that this process is fair and impartial." (Ex. 129.)

Based on the above evidence that Bailets had specifically been warned not to complain about Ciber, that Bailets' most recent evaluation ranked his performance as outstanding and commendable, that new employees were hired and other employees given pay raises shortly after Bailets' termination, and that Bailets

was not considered for subsequent job openings, this court concludes that the Commission did not meet its burden of proving that it had separate and legitimate reasons for Bailets' termination that were not merely pretextual.

Finally, this court must decide the issue of damages. Section 5 of the Law provides that:

> [a] court . . . shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, *actual damages* or any combination of these remedies. A court shall also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the complainant prevails in the civil action.

43 P.S. §1425 (emphasis added).

Here, both sides presented evidence as to Bailets' economic loss because of his discharge. Bailets presented the expert testimony of economist Andrew C. Verzilli, who calculated that Bailets' total economic loss from the date of his termination through March 2016 was between $1.4 and $1.6 million. (Ex. 45; N.T., 5/25/16, at 508, 510.) Verzilli used the normal retirement age of 67 because Bailets intended to work until that age. (N.T., 5/25/16, at 517.) He used 1.4 percent per year wage progressions based on data from the Bureau of Labor Statistics regarding earnings growth for state workers. (*Id.* at 509.) The $1.6 million takes into account a 2% annual productivity growth rate. (*Id.* at 511, 514.)

The Commission presented the expert testimony of forensic economist Chad Staller, who opined that Bailets' economic loss was $944,000. (N.T., 5/26/16,

at 902.) Staller used a retirement age of 60. (*Id.* at 906.) Staller also presumed that Bailets would obtain a comparable paying job by July 2017. (*Id.* at 909.)

This court finds that, although the Commission's employees can retire at 60, Bailets, who has worked since the age of 14, does not intend to retire at age 60 and has every intention to work as long as possible. (N.T., 5/23/16, at 189; N.T., 5/25/16, at 517.) In this regard, we note that Bailets is married and the father of triplets and thus has a personal incentive to work until age 67. (N.T., 5/23/16, at 52-53.) Accordingly, this court accepts a retirement age of 67. Additionally, this court accepts a two percent productivity increase based on the average annual increase in workers' wages.

Finally, this court rejects Staller's opinion that Bailets will find a comparable paying job by July 2017. After finding his present job, Bailets has continued to look for a higher paying position to no avail. (N.T., 5/26/16, at 537.) Verzilli explained that Bailets had not secured a job with pay comparable to what he was earning at the Commission because Bailets' job at the Commission "was specialized and unique." (N.T., 5/25/16, at 516.) Verzilli explained that similar jobs do not exist in the "general private sector." (*Id.*) Verzilli further explained that the economic impact on employees who have been terminated involuntarily "can last 10 to 20 years in terms of never replacing their pre-displacement earnings." (N.T., 5/26/16, at 516.) Thus, for economic damages, this court awards Bailets $1.6 million.

As to non-economic damages, Bailets argues that they are available under the Law, whereas the Commission argues that they are not. We agree with Bailets

that nothing in the Law precludes him from obtaining non-economic damages. Section 5 of the Law specifically states that a complainant is entitled to "actual damages" as the court considers appropriate. The term actual damages is not defined under the Law. However, in *Joseph v. Scranton Time, L.P.*, 129 A.3d 404, 429 (Pa. 2015) (citation omitted), the Pennsylvania Supreme Court made clear that actual damages include not only economic but non-economic injuries such as "'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'"[20]

In *O'Rourke,* our Pennsylvania Supreme Court noted that the Law was designed "to 'enhance openness in government . . . by protecting those who inform authorities of wrongdoing.'" 778 A.2d at 1202 (citation omitted.) Chief Justice Saylor cogently explained:

> An employee of a public body is often in the best position to know that illegal or unethical activities are occurring within that body, and thus, to report such activities. This is particularly significant because, if such illegalities are taking place, the employer and/or the individuals who benefit ordinarily have no incentive to reveal them and, additionally, may be adept at concealing them from the outside world. Therefore, the Commonwealth and its citizens benefit substantially when employees aid in the enforcement of legal and ethical codes 'by raising substantiated claims of wrongdoing through protected procedural channels,' which serves the interests of exposing

[20] The Commission argues that, because the Legislature did not specifically define actual damages in the Law, non-economic damages are not recoverable. As an example, the Commission points to section 9(f)(1) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §959(f)(1), which includes damages for humiliation and embarrassment. Because our Supreme Court in *Joseph,* 129 A.3d at 429, explained that the term "actual damages" may include compensation for non-economic injury and in *O'Rourke*, 778 A.2d at 1202, emphasized the importance of ensuring that the whistleblower is "put in no worse a position for having exposed the wrongdoing," we disagree.

> and halting the illegalities, and relieves the government of some of the expenses of investigation and litigation. Just as surely, however, an employee who becomes aware of wrongful activities within a public entity will often feel compelled to remain silent about the illicit conduct, lest he be subjected to harassment and other adverse action by his management and co-workers . . . . Accordingly, absent some measure of assurance that the employee will ultimately be put in no worse a position for having exposed the wrongdoing, the Commonwealth largely foregoes the benefit of such "employee reporters."

Id. (citations omitted.)

Based on our Supreme Court's admonition in *O'Rourke*, 778 A.2d at 1202, of the importance of ensuring that the whistleblower is put "in no worse a position for having exposed the wrongdoing," we conclude that "actual damages" must include compensation for the mental anguish, humiliation, and reputation damage that Bailets suffered as a result of the termination of his employment.

Our holding in this respect is in accord with courts of other states with similar, if not identical, whistleblower protection laws. For example, in *Robertson County v. Wymola*, 17 S.W.3d 334, 347 (Tex. Ct. App. 2000) (citations omitted), the Texas Court of Appeals affirmed an award of actual damages for a whistleblower who showed that her mental anguish was more than "'mere worry, anxiety, vexation, embarrassment, or anger.'" The court found that the whistleblower's testimony that the loss of her job was "devastating" and "overwhelming" was sufficient to award damages for mental anguish. *Id.* Like Pennsylvania's Law, "actual damages" in the Texas Whistleblower Protection Law was undefined. *Id.*

Likewise, in *Rogers v. City of Fort Worth,* 89 S.W.3d 265, 284 (Tex. Ct. App. 2002), the court affirmed an award of actual damages, including mental anguish, in favor of a whistleblower, where the evidence showed the duration of his mental anguish, established that his daily routine was substantially disrupted, and that he suffered a high degree of mental pain and distress. It also considered that, after his termination, the whistleblower "had considerable difficulty obtaining a job." *Id.* That court also explained that "[w]rongdoing that threatens a person's reputation is sufficient to support an inference that the resulting injury was accompanied by mental anguish." *Id.*

Melchi v. Burns International Security Services, Inc., 597 F. Supp. 575, 585-586 (E.D. Mich. 1984) was cited with approval by our Supreme Court in *O'Rourke*, 778 A.2d at 1202. The court in *Melchi* interpreted the Michigan Whistleblower Protection Law, which permits the award of actual damages in language virtually identical to Pennsylvania's Law. That court considered the whistleblowing claimant's request for damages for emotional distress and humiliation, but declined to award the damages only because it found that the claimant had acted with an improper motive. *Id.* at 585, 586.

Without compensation for harm to his reputation,[21] humiliation, and mental anguish, Bailets would be in a far worse position for having reported the wrongdoing. *See O'Rourke,* 778 A.2d at 1202. In fact, because of all that he has endured since the Commission's termination of his employment, Bailets has

[21] One's reputation is a fundamental right under the Pennsylvania Constitution. *Pennsylvania Bar Association v. Pennsylvania Insurance Department*, 607 A.2d 850, 856 (Pa. Cmwlth. 1992).

questioned whether he should have reported the waste and wrongdoing and whether it was worth putting himself and his family through the loss of his job. (N.T., 5/25/16, at 538.) After struggling for three years to find a suitable job, Bailets was finally offered and accepted a job that paid only approximately two-thirds of his Commission salary. (N.T., 5/23/16, at 174.) After taking that job, he has continued to search, to no avail, for a higher paying job. Adding to his humiliation before his family, friends and community, prior to finding that job, Bailets was forced to take a minimum wage job far below his skill, education and experience level, shuttling cars for an auto dealership, just to get by. (*Id.* at 53, 174.)

In assessing the value of the non-economic damages, this court credits the testimony of Bailets and his wife that he suffered humiliation and mental anguish when he was fired shortly before Thanksgiving and escorted from his office carrying his belongings in a box; when he had to tell his wife of 21 years and his then 13-year-old-triplet daughters that he did not have a job; when he had to tell his father-in-law that he was no longer a provider for his daughter and granddaughters; and when he had to face extended family members, who were doctors, lawyers, engineers, and accountants at Thanksgiving dinner and admit that he no longer had a job. (*Id.* at 190; N.T., 5/25/16, at 535.) Bailets was known to be a worker and provider for his family. (*Id.*) However, after his termination from the Commission, Bailets was known as the guy without a job who could no longer provide for his family. (N.T., 5/23/16, at 190.) Bailets, whose father had died when he was 8 years old and who had worked since the age of 14, suddenly no longer had a job. (*Id.* at 189-90.) Bailets suffered further humiliation when he had to use his unemployment compensation debit card at the local grocery store where people knew him. (*Id.* at

190.) Bailets testified that he "had no end of sleepless nights" worrying about paying bills, medical costs, vehicle repairs, and college expenses for his three daughters, (*id.* at 190-91) and that he was heart-broken when one of his daughters apologized to him for needing a new pair of cleats because her feet had grown. (*Id.* at 194.)

There is no doubt that the Commission's wrongful termination of Bailets had a profound effect on Bailets and caused a major disruption to his life. Therefore, this court concludes that for his non-economic actual damages, which include harm to his reputation, humiliation, and mental anguish, Bailets is entitled to an additional award equal to that of his economic damages, or $1.6 million.

Accordingly, this court awards Bailets a total of $3.2 million.[22]

ROCHELLE S. FRIEDMAN, Senior Judge

[22] We recognize that public policy considerations preclude the imposition of punitive damages against a Commonwealth agency. *See Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.2d 1270, 1277 (Pa. 1986). However, punitive damages serve the important purpose of punishing the wrongdoers and deterring future misconduct. *Id.* at 1276. Our Legislature recognized this important purpose in the year 2014, when it amended section 6 of the Law, 43 P.S. §1426, to permit the imposition of a civil fine of not more than $10,000 against a "person who, under color of an employer's authority," violates the Law, as well as possible suspension of that person from public service up to seven years where the intent was to discourage the reporting of criminal activity. Such civil fine is payable to the State Treasurer for deposit into the General Fund. *Id.*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph M. Bailets, Petitioner v. Pennsylvania Turnpike Commission, Anthony Q. Maun, (Director of Accounting), and Nikolaus H. Grieshaber, (Chief Financial Officer), Respondents	:	No. 265 M.D. 2009

ORDER

AND NOW, this 6th day of October, 2016, after a non-jury trial in the above matter, a decision is entered in favor of Ralph M. Bailets and against the Pennsylvania Turnpike Commission in the amount of $3.2 million. The Chief Clerk shall enter judgment accordingly if no post-trial motions are filed within 10 days of the date of this order, as set forth in Pa. R.C.P. No. 227.1.

It is further ordered that within 30 days of the date of this order, Bailets shall file with this court any petition for costs of litigation, including reasonable attorney fees and witness fees, in accordance with section 5 of the Whistleblower Protection Law, Act of December 12, 1986, P.L. 1559, 43 P.S. §1425.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Senior Judge

Certified from the Record

OCT 06 2016

And Order Exit

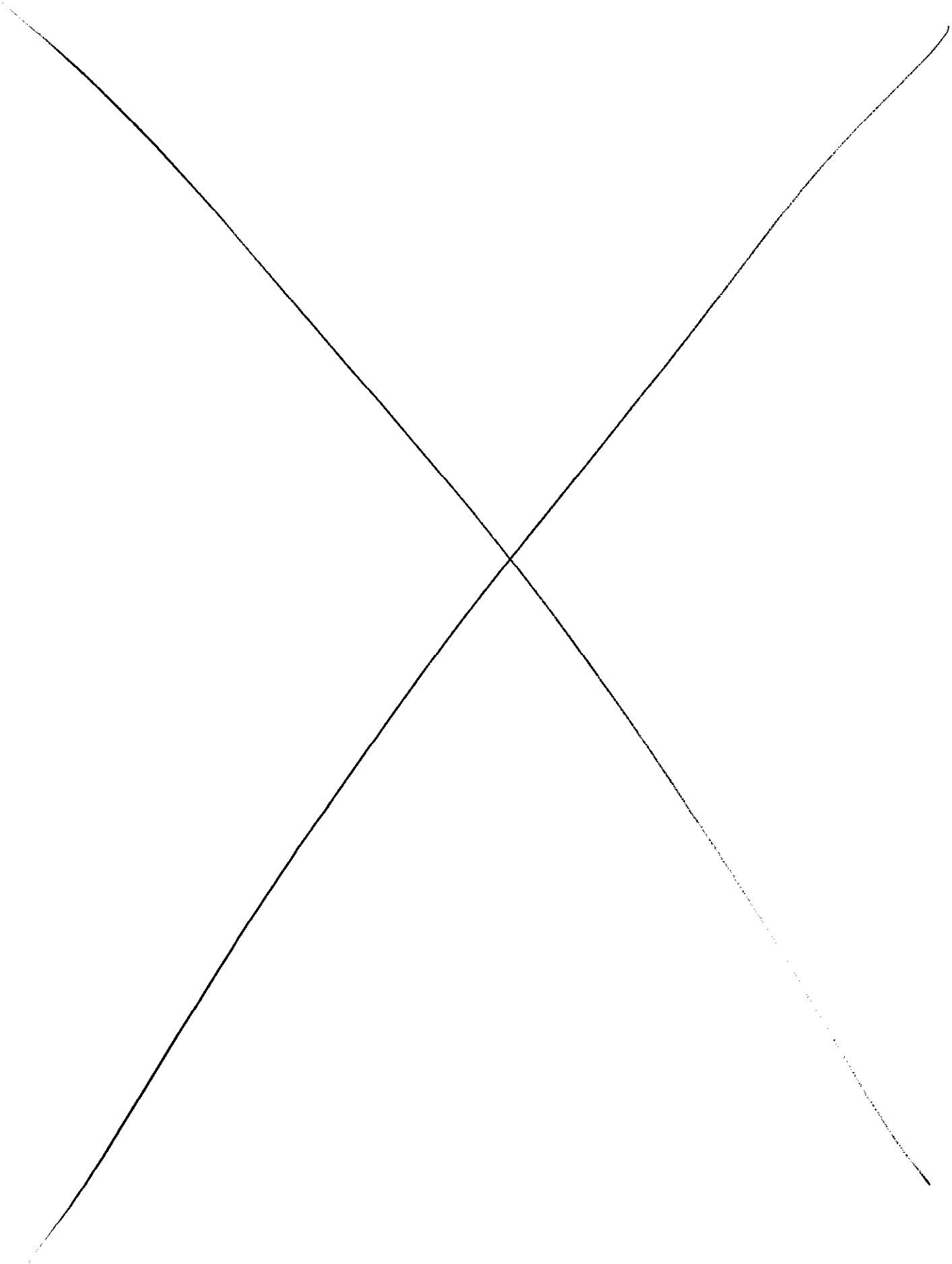

EXHIBIT 3

To Brief in Support of Definitive Motion for Post-Trial Relief

COPY

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

___Medical Professional Liability Action (check if applicable)

Type of Pleading:
Continuing Objections to and Response, to Plaintiff's Contemporaneous Time Sheets Untimely Submitted in Support of his Petition for Litigation Costs

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
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PA I.D. Number 56157

DEFENDANT'S CONTINUING OBJECTIONS, AND RESPONSE, TO PLAINTIFF'S CONTEMPORANEOUS TIME SHEETS UNTIMELY SUBMITTED IN SUPPORT OF HIS PETITION FOR LITIGATION COSTS

AND NOW comes Defendant, The Pennsylvania State University, by and through its counsel of record, White and Williams LLP, and files its Response to Plaintiff's Contemporaneous Time Sheets Submitted in Support of his Petition for Litigation Costs, alleging in support thereof as follows:

I. INTRODUCTORY STATEMENT

Defendant, The Pennsylvania State University ("University") incorporates herein, as if more fully set forth at length, its: (a) Objections, Answer and New Matter to Plaintiff's Petition for Costs of Litigation, filed on or about January 11, 2017, and (b) Objection to this Honorable Court's permitting Plaintiff to supplement his defective Petition for Costs of Litigation with the untimely submission of his attorneys' contemporaneous time sheets, filed on or about January 25, 2017.

II. RELEVANT PROCEDURAL HISTORY

A. PLAINTIFF'S PETITION FOR LITIGATION COSTS

In the Court's November 30, 2016 Order, it instructed Plaintiff to submit "detailed statements of the counsel fees, witness fees and costs of litigation it incurred. . . ." The Court permitted the University to challenge "a fee, etc." as

unreasonable by "identify[ing] the item and stat[ing] why the charge is inappropriate."

Instead, Plaintiff chose to submit a Petition for Costs of Litigation ("Petition") which contained no "detailed statement" at all. Although Plaintiff's Petition averred that Attorney Strokoff's office had kept detailed statements of the counsel fees that Plaintiff had incurred (while Attorney Fleming did not), and identified the total amount of attorney fees that Attorney Strokoff's office had incurred in its representation of Plaintiff, Plaintiff argued that the Court should award him a contingency fee enhancement equal to the sum of $1,658,016 (1/3 of the Pennsylvania Whistleblower Law ("PWBL") award) -- plus other expenses in the amount of $34,641.14.

B. THE UNIVERSITY'S RESPONSE

The University filed its Objections, Answer and New Matter to the Plaintiff's Petition for Costs of Litigation ("Response"). As set forth above, the University incorporates same herein as if more fully set forth at length. The University maintains its objections that: (a) Plaintiff's request that the Court calculate his attorney fees based upon a method other than the "lodestar" method -- i.e. by using a contingency fee enhancement -- is improper, and (b) Plaintiff's Petition failed to produce the evidence necessary for it to establish the "lodestar"; accordingly, Plaintiff's Petition should be denied and dismissed with prejudice,

and no attorney fees should be awarded to Plaintiff in connection with his PWBL claim.

C. COURT'S *SUA SPONTE* RESPONSE

On or about January 18, 2017, and after receiving and reviewing the University's Response, the Court, of its own accord, sent email correspondence to the parties, as follows:

> "Given defendants response , I assume you will be submitting your contemporaneous time sheets. You may have until January 25 to do so. Defendant will have until February 8 to file it's response. While Mr. Fleming may not have kept contemporaneous records, he can make use of the Strokoff records to the extent that he attended meetings, depositions etc."

D. THE UNIVERSITY'S OBJECTION

On or about January 25, 2017, the University filed of record an Objection to the Court's permitting Plaintiff to supplement his deficient Petition. The University incorporates that Objection, herein, as if more fully set forth at length.

E. PLAINTIFF'S FILING OF HIS CONTEMPORANEOUS TIME SHEETS

In response to the Court's *sua sponte* allowance, on or about January 25, 2017, Plaintiff submitted his attorneys' contemporaneous time sheets to the University.

F. THE UNIVERSITY'S RESPONSE

Subject to the objections set forth above, and in those filings incorporated herein, the University responds to Plaintiff's submission of his attorneys' contemporaneous time sheets as follows.

II. DISCUSSION

In his Petition, Plaintiff appears to request only the reimbursement of attorney fees and costs incurred in connection with his claim under the PWBL. [Plaintiff's Petition, ¶32]. However, the contemporaneous time sheets that Plaintiffs' counsel kept, alluded to in his Petition [Plaintiff's Petition, ¶29], and which he has now produced, include entries for legal work that must be excluded from any fee award, including work performed in connection with Plaintiff's Defamation and Misrepresentation claims (that are not brought under a fee-shifting statute), as well as "block time" entries which contain "mixed" time entries involving all three of Plaintiff's claims that do not apportion the time spent on legal work in connection with each of the claims. Plaintiff's contemporaneous time sheets further include entries for legal work performed on matters unrelated to any of his claims, and entries that are so vague in their description that it is impossible to determine if they are related to Plaintiff's PWBL claim. Plaintiff has made no attempt to remove from his contemporaneous time sheets any of these non-compensable time entries.

A. ONLY ONE OF PLAINTIFF'S THREE CLAIMS (HIS PWBL CLAIM) IS SUBJECT TO A FEE SHIFTING STATUTE

1. Plaintiff's PWBL Claim is based upon a statute that authorizes fee shifting of attorney's fees attributable to that claim.

Section 1425 of the Pennsylvania Whistleblower Law (43 Pa.C.S. Section 1425) provides:

> Enforcement. A court, in rendering a judgment ***in an action brought under this act***, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court shall also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the complainant prevails in the civil action.

(emphasis added). Under Section 1425, only "costs of litigation" – "including reasonable attorney fees" -- incurred "in an action brought under this act" may be awarded, in whole or in part, by a Court. *Id.*

2. Plaintiff's Defamation and Misrepresentation Claims do not permit the shifting of attorney's fees attributable to those claims.

On the other hand, the express words of Section 1425 mandate that a Court has no authority to award any "costs of litigation" whatsoever in connection with any action not brought under the Whistleblower Law – including but not limited, as applicable here, actions brought under the torts of defamation or misrepresentation.

B. PLAINTIFF IS ONLY ENTITLED TO THE SHIFTING OF THOSE ATTORNEY'S FEES THAT HE INCURRED AS A RESULT OF HIS PWBL CLAIM

As set forth in the University's Objections, Answer and New Matter to the Plaintiff's Petition for Costs of Litigation, which is incorporated herein, the "American Rule" provides that litigants are to bear their own litigation costs, absent a special circumstance such as a written contract, or a statute to the contrary. See *Mosaica Acad. Charter School v. Bensalem Township*, 813 A.2d 813, 822 (Pa. 2002)(Under the American Rule, a litigant cannot recover his attorney fees from the opposing party 'unless there is express statutory authorization, a clear agreement of the parties or some other established exception"). For claims involving an exception to the "American Rule" – for instance, a claim under a fee-shifting statute – the "lodestar" method is applied to arrive at a "reasonable" attorney fee. See *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 457, 34 A.3d 1 (Pa. 2011).

In cases involving a mixture of (a) one or more claims governed by the "American Rule", and (b) one or more claims governed by an exception to the "American Rule", courts must carefully delineate between fees incurred in connection with a claim that is excepted from the "American Rule" (which may be shifted) and fees incurred in connection with other claims in that lawsuit that are not excepted from the "American Rule" (which may not be shifted). *See e.g.*

Klipper Constr. Assocos. v. Warwick Twp. Water & Sewer Auth., 105 A.3d 856, 2014 Pa. Commw. Unpub. LEXIS 718, *35-*39 (Pa.Cmwlth. 2014)(Trial court awarded 9% of the attorney fees that a litigant sought based upon the fact that the litigant litigated eleven claims; Commonwealth Court held that a trial court may properly consider the number of legal claims pursued that are not subject to the right to attorney fees and the percentage of damages attributable to such claims in determining a reasonable attorney fee under a statute that provides for attorney fees); *Ambrose v. Citizens National Bank of Evans City*, 2010 PA Super 172, 5 A.3d 413 (Pa. Super. 2010) ("does not require that fees be awarded without reduction for other claims that the plaintiff chooses to litigate simply because they involve overlapping or intertwined evidence"); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1031-32 (Pa. Super. 2005) (where multiple claims are litigated and only some are under a statute authorizing recovery of attorney fees, attorney fee award must be limited to fees incurred in pursuing claims brought under fee-shifting statute).

The reasoning in *Klipper* and *Neal* controls the required analysis of Plaintiff's contemporaneous fee sheets. The University challenges as unreasonable individual fee entries set forth in Plaintiff's contemporaneous time sheets upon the following six grounds:

1. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University attorneys' fees that he incurred as a result of his Defamation cause of action.

2. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University attorneys' fees that he incurred as a result of his Misrepresentation cause of action.

3. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University attorneys' fees that he incurred as a result of legal work performed by his lawyers that was related to his causes of action to be tried to a Jury (i.e. his Defamation and Misrepresentation causes of action), not to the Court (i.e. his PWBL cause of action).

4. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University attorneys' fees that he incurred as a result of legal work performed by his lawyers that was related to legal matters unrelated to any of the causes of action in this lawsuit.

5. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University attorneys' fees that he incurred that are so vaguely documented in Plaintiff's contemporaneous time sheets that it precludes a determination of whether or not

those fees were, or were not, incurred as a result of Plaintiff's PWBL cause of action.

6. It is unreasonable (because it is impermissible as a matter of law under Section 1425) for Plaintiff to seek to shift to the University the entirety of those "block-billed" time entries on his contemporaneous time sheets that include legal work that is necessarily related to both Plaintiff's tort (i.e. defamation and misrepresentation) causes of action, and his PWBL cause of action. Instead, it is only reasonable for Plaintiff to seek to shift to the University 33.3% of each of those "block-billed" entries which contain "mixed" time entries.

C. THE UNIVERSITY'S ANALYSIS OF PLAINTIFF'S CONTEMPORANEOUS FEE SHEETS

1. The University's Annotation of Plaintiff's contemporaneous fee sheets

See Attachment I. In order to allow for an organized discussion of Plaintiff's contemporaneous fee sheets, the University has annotated same as follows.

The University took the contemporaneous fee sheets produced by Plaintiff and, starting with the first page of Plaintiff's attorneys' contemporaneous fee sheets, assigned a sequential number to each page of the fee sheets. The first page of Attorney Strokoff's fee sheets is designated Sheet "1". The final page of

Attorney Strokoff's fee sheets is designated "52". The first page of Attorney Fleming's fee sheets is designated "53" and the final page is designated "62".

Then, the University sequentially lettered each individual daily time entry on each now-numbered fee sheet, starting with "A" and ending with the appropriate letter that corresponded to the last entry (given that the number of individual time entries on a page varied).

For those days where more than one time entry was entered, the University designated each entry individually, under the letter that corresponded to that day's entry, and then further designated with a sequential number. For example, if the first day of billing on any given time sheet had three time entries, those three entries are designated "A1", "A2", and "A3".

2. The University's Spreadsheet Analysis of those Time Entries contained in Plaintiff's contemporaneous fee sheets: (a) that are required to be stricken because they relate only to Plaintiff's Defamation Claim, Plaintiff's Misrepresentation Claim, Jury Trial issues, vague time entries, or unrelated legal matters; or (b) for which Plaintiff is entitled to no more than 33.3% of the time entered, because those entries are "block-billed", and relate to Plaintiff's PWBL Claim, but also his two tort claims.

See Attachment II. Based upon the classification system described above, the University then created a graph which, on its vertical axis, contains the six categories of objections that are described in detail above and, on its horizontal axis, lists each "fee sheet number" – from "1" to "62". Inside the graph's grid, the

University then placed the letter of each individual time entry that it is objecting to: (a) in the column corresponding to that lettered time entry's page number, and (b) in the row corresponding to the basis for objection that applies to that lettered time entry.

3. The aggregate value of the individual Time Entries on Plaintiff's contemporaneous time sheets that the University objects to, and that Plaintiff cannot, for the reasons set forth above, recover.

	Strokoff Time Sheets	**Fleming Time Sheets**
Defamation-related entries	$36,631	$2,502.50
Misrep.-related entries	$8,157	$1,925
Jury Trial issue-related entries	$34,718	$7,507.50
Vague entries	$19,428.50	$19,800
Unrelated issues	$22,280.50	$2,392.50
Mixed Entry (REDUCE BY 66.6%)	[$312,986 x .66666 =] $208,655	[$93,692.50 x .66666] $62,461
SUB-TOTALS:	$329,880.00	$96,588.50
TOTAL:	**$426,468.50**	

WHEREFORE, The Pennsylvania State University, the Defendant, respectfully requests that this Honorable Court:

(a) reject Plaintiff's improper request to calculate his attorney fees that may be shifted under the PWBL by reference to something other than the lodestar;

(b) dismiss Plaintiff's request for attorney's fees because he failed to timely produce the evidence necessary to establish the lodestar; or

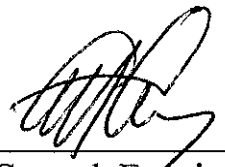
(c) in the alternative only, apply the lodestar, as calculated in a case such as this in light of *Klipper* and *Neal*, supra., and award to Plaintiff no more than the sum of $202,619.50 in attorney fees, as follows:

(i) for Attorney Strokoff's offices time, no more than the sum of $161,708, which is equal to the $491,588 (for 1740.15 hours of time, at varying rates) documented in his office's contemporaneous fee sheets, minus $329,880 of that time that cannot be recovered by Plaintiff, for the reasons set forth above; and

(ii) for Attorney's Fleming's time, no more than the sum of $40,911.50, which is equal to the $137,500 (for 500 hours of time, at $275.00/hour) documented in his office's contemporaneous fee sheets, minus $96,588.50 of that time that cannot be recovered by Plaintiff, for the reasons set forth above.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: 

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Andrew H. Ralston, Jr. Esquire
Attorney PA I.D. No. 88770
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

Dated: February 8, 2017

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Michael McQueary
C/O John McQueary
212 Seneca Circle
State College PA 16801

December 02, 2011
Account No: 2716-00M
Statement No: 21232

RE: Employment

— Legal Fees —

				Rate	Hours	
A	11/13/2011	EAS	Initial consult with client	250.00	1.30	250.00
B	11/16/2011	EAS	Review severance documents and administrative leave document; telephone conference with Attorney Tim Flemming re: [redacted]	275.00	0.40	110.00
C	11/17/2011	EAS	Review Reeves proposal; telephone conference with Tim Flemming re: [redacted]	275.00	0.40	110.00
D	11/28/2011	EAS	Telephone conference with Attorney Flemming re: [redacted]	275.00	0.20	55.00
			Total Legal Fees . . .		2.30	525.00
			Total Current Work			525.00

— Payments Received —

E	12/02/2011	Received Payment from Trust	-525.00
		Please pay this amount	$0.00

Beginning Trust Balance	$1,000.00
funds used to pay this statement	525.00
Ending Trust Balance	475.00

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

EXHIBIT
tabbies
A

1

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January 04, 2012
Account No: 2716-00M
Statement No: 21402

RE: Employment

— Legal Fees —

			Rate	Hours	
12/09/2011	EAS	Telephone conference with Attorney Fleming re: [redacted] telephone conference with client re: [redacted]	275.00	0.40	110.00
12/20/2011	EAS	Telephone conference with Attorney Fleming re: [redacted]	275.00	0.10	27.50
12/21/2011	EAS	Draft letter to client re: [redacted]	275.00	1.00	275.00
		Total Legal Fees . . .		1.50	412.50

— Expenses Incurred —

12/30/2011	Postage	0.44
	Total Expenses . . .	0.44
	Total Current Work	412.94

— Payments Received —

1/04/2012	Received Payment from Trust	-412.94
	Please pay this amount	$0.00

Beginning Trust Balance	$475.00
funds used to pay this statement	412.94
Ending Trust Balance	$62.06

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

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PAID
3/15/12

Page: 1
March 02, 2012
Account No: 2716-00M
Statement No: 21698

RE: Employment

— Legal Fees —

			Rate	Hours	
02/15/2012	EAS	Conference call with Attorney Fleming and client	275.00	0.50	137.50
		Total Legal Fees . . .		0.50	137.50

— Expenses Incurred —

02/21/2012	Long distance telephone charges	0.44
	Total Expenses . . .	0.44
	Total Current Work	137.94
	Please pay this amount	$137.94

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

3

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April 03, 2012
Account No: 2716-00M
Statement No: 21896

Michael McQueary
C/O John McQueary
212 Seneca Circle
State College PA 16801

PAID
4/13/12

RE: Employment

— Legal Fees —

			Rate	Hours	
A 03/05/2012	EAS	Telephone conference with client and Attorney Fleming re: [redacted]	275.00	0.50	137.50
		Total Legal Fees . . .		0.50	137.50
		Total Current Work			137.50
		Previous Balance			$137.94

— Payments Received —

03/02/2012	Received Payment from Trust	-62.06
03/15/2012	Received Payment	-137.94
	Total Payments Received	-200.00
	Please pay this amount	$75.44

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

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Fill out and return the enclosed form to charge amount due.
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4

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PAID
5/15/12

Page:
May 02, 201
Account No: 2716-00M
Statement No: 2205

RE: Employment

— Legal Fees —

				Rate	Hours	
A	04/02/2012	EAS	Telephone conference with client and Attorney Fleming	275.00	0.20	55.00
B	04/03/2012	EAS	Telephone conferences with Katherine Allen; telephone message to General Counsel's administrative assistant; telephone conference with Tim Fleming	275.00	0.30	82.50
C	04/13/2012	EAS	Telephone conference with client; telephone conference with General Counsel Baldwin; telephone conference with client	275.00	0.50	137.50
D	04/16/2012	EAS	Telephone conference with General Counsel Baldwin; conference call with client and Attorney Fleming	275.00	0.80	220.00
			Total Legal Fees . . .		1.80	495.00

— Expenses Incurred —

04/24/2012	Long distance telephone charges	2.27
	Total Expenses . . .	2.27
	Total Current Work	497.27
	Previous Balance	$75.44

— Payments Received —

04/13/2012	Received Payment	-75.44
	Please pay this amount	$497.27

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed
on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
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(5)

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PAID
6/29/12

June 05, 2012
Account No: 2716-00M
Statement No: 22233

Michael McQueary
C/O John McQueary
212 Seneca Circle
State College PA 16801

RE: Employment

— Legal Fees —

			Rate	Hours	
05/01/2012	EAS	Research update re: whistleblower law; research re: PSU personnel policies/fixed term contracts	275.00	1.40	385.00
05/02/2012	EAS	Conference call with client and Attorney Fleming re: [redacted] letter to general counsel Baldwin	275.00	0.70	192.50
05/03/2012	JAN	Research re: damages in whistleblower action	190.00	0.50	95.00
05/04/2012	JAN	Continue research re: damages in whistleblower action and related torts	190.00	1.20	228.00
05/07/2012	EAS	Brief telephone conference with Attorney Fleming; draft praecipe for Writ of Summons, Writ of Summons, cover sheets and letter to Fleming	275.00	1.10	302.50
05/16/2012	EAS	Research; conference with client (Attorney Fleming by phone for most of conference)	275.00	2.50	687.50
05/23/2012	EAS	Telephone conference with client and Attorney Fleming re: [redacted]; telephone conference with Attorney Fleming	275.00	0.30	82.50
		Total Legal Fees . . .		7.70	1,973.00

— Expenses Incurred —

05/31/2012	Photocopy charges	1.50
05/31/2012	Photocopy charges	17.60
	Total Expenses . . .	19.10

— Costs Advanced —

05/07/2012	Filing fee - Prothonotary Centre County	120.50
05/07/2012	Sheriff's fee - Service - Centre County	75.00
05/07/2012	Courier fee - UPS	20.61
	Total Advances . . .	216.11
05/22/2012	Sheriff's fee - refund excess payment	-24.50
	Total Credits for Advances	-24.50
	Total Current Work	2,183.71
	Previous Balance	$497.27

(6)

Michael McQueary

Page:
June 05, 201
Account No: 2716-00
Statement No: 2223

RE: Employment

— Payments Received —

05/15/2012	Received Payment	-497.2
	Please pay this amount	$2,183.7

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed
on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

Delivery Service Invoice
Invoice date June 2, 2012
Invoice number 000096FY33222
Shipper number 96FY33

Outbound

UPS Shipping Document

Pickup Date	Tracking Number	Service	ZIP Code	Zone	Weight	Billed Charge
05/07	1Z96FY332210000719	Next Day Air Commercial Letter	16801	102	Letter	18.00
		Fuel Surcharge				2.61
		Total				20.61

Sender : CINDY
STROKOFF & COWDEN, PC
STATE
HARRISBURG PA 17104

Receiver: BENNETT
Fleming Law firm
204 CALDER
STATE COLLEGE PA 16801

Total UPS Shipping Document	**1 Package(s)**	**20.61**
Total Outbound	**1 Package(s)**	**20.61**

McQuary

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PAID 7/20/12

July 10, 2012
Account No: 2716-00M
Statement No: 22405

RE: Employment

— Legal Fees —

				Rate	Hours	
A	06/04/2012	EAS	Continue research PSU HR rules	275.00	0.90	247.50
B	06/05/2012	EAS	Telephone conference with client re: [redacted] brief telephone conference from Attorney Fleming	275.00	0.50	137.50
C	06/12/2012	EAS	Brief telephone conference with Attorney Fleming; conference with Attorney Fleming and client	275.00	0.20	55.00
D	06/19/2012	EAS	E-mail to Attorney Fleming re: [redacted]	275.00	0.10	27.50
E	06/26/2012	EAS	Extended telephone conference with client and Attorney Fleming; telephone conference with client and Attorney Fleming re: [redacted]	275.00	0.60	165.00
F	06/27/2012	EAS	Review March - June pay stubs	275.00	0.10	27.50
			Total Legal Fees . . .		2.40	660.00

— Expenses Incurred —

06/26/2012	Long distance telephone charges	0.12
06/30/2012	Photocopy charges	6.10
	Total Expenses . . .	6.22
	Total Current Work	666.22
	Previous Balance	$2,183.71

--- Payments Received ---

6/29/2012	Received Payment	-2,183.71
	Please pay this amount	$666.22

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

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Fill out and return the enclosed form to charge amount due.
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(9)

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PAID
8/14/12

Michael McQueary
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212 Seneca Circle
State College PA 16801

Page:
August 02, 201
Account No: 2716-00M
Statement No: 2252

RE: Employment

--- Legal Fees ---

				Rate	Hours	
A	07/10/2012	EAS	Telephone conference with Attorney Fleming re: letter to PSU re: [redacted]; draft letter; e-mail to Fleming re: [redacted]	275.00	0.60	165.00
B	07/12/2012	EAS	Cursory review of Freeh report; conference call with client and Attorney Fleming	275.00	1.50	412.50
C	07/16/2012	EAS	Draft letter to Attorney Conrad	275.00	0.20	55.00
D	07/17/2012	EAS	Extended telephone conference with client and Attorney Fleming; review Cleary Act/regulation/Dept of Ed Policy	275.00	1.40	385.00
E	07/19/2012	EAS	Draft follow up letter to Conrad	275.00	0.10	27.50
F	07/23/2012	EAS	Telephone conference with opposing counsel (Conrad)	275.00	0.30	82.50
G	07/24/2012	EAS	Conference call with client and Attorney Fleming; e-mail to Attorney Fleming	275.00	0.50	137.50
H	07/25/2012	EAS	Telephone conference with opposing counsel (Conrad); e-mails to client and Fleming re: [redacted]	275.00	0.50	137.50
I	07/26/2012	EAS	Conference call with client and Attorney Fleming	275.00	0.60	165.00
J	07/30/2012	EAS	Draft letter to opposing counsel (Conrad)	275.00	1.10	302.50
K	07/31/2012	EAS	Complete drat of letter to Attorney Conrad	275.00	0.30	82.50
			Total Legal Fees . . .		7.10	1,952.50

--- Expenses Incurred ---

07/31/2012	Photocopy charges	3.70
07/31/2012	Photocopy charges	68.40
07/31/2012	Postage	0.45
	Total Expenses . . .	72.55
	Total Current Work	2,025.05
	Previous Balance	$666.22

— Payments Received —

07/20/2012	Received Payment	-666.22

(F

Michael McQueary

Page: 2
August 02, 2012
Account No: 2716-00M
Statement No: 22522

RE: Employment

Please pay this amount $2,025.05

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed
on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

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October 30, 2012
Account No: 2716-00M
Statement No: 22921

Michael McQueary
C/O John McQueary
212 Seneca Circle
State College PA 16801

PAID
11/2/12

RE: Employment

— Costs Advanced —

10/30/2012	Copies from outside source - Centre County Court 9/21 invoice (copy attached)	35.40
	Total Advances . . .	35.40
	Total Current Work	35.40
	Previous Balance	$2,025.05

— Payments Received —

08/14/2012	Received Payment	-2,025.05
	Please pay this amount	$35.40

Payment due 20 days from invoice date.
A finance charge of 1.25% per month will be assessed on all accounts past due 20 days.

We accept VISA and MasterCard, cash, check and money order for payment of bills.
Fill out and return the enclosed form to charge amount due.
We accept cash payments in our office.

Maxine O. Ishler

INVOICE

Court Administrator
Centre County Court of Common Pleas
Room 208, Courthouse
102 South Allegheny Street
Bellefonte, PA 16823

Phone (814) 355-6727 Fax (814) 355-6707

DATE: September 21, 2012
INVOICE # CVS-2012-203

BILL TO:
W. Timothy Fleming, Esquire

Phone ( ) FAX ( )

COPY
FOR: Transcript(s) in the case of:
Commonwealth VS
Gerald Sandusky
CP-14-CR-2421-2011
CP-14-CR-2422-2011

A

DESCRIPTION	PAGES	RATE	AMOUNT
June 12, 2012 Jury Trial - Day 7-Michael McQueary's Testimony	118.00	0.30	$ 35.40
		SUBTOTAL	$ 35.40
		TAX RATE	
		SALES TAX	
		OTHER	
		TOTAL	$ 35.40

Make all checks payable to: **CENTRE COUNTY TREASURER** **[Return to: Court Court Administrator's Office]**
THE TRANSCRIPT(S) WILL NOT BE RELEASED UNTIL PAYMENT IN FULL IS RECEIVED.

THANK YOU FOR YOUR BUSINESS!

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January 19, 2017
Account No: 2716-00M
Statement No: 31155

Michael McQueary
C/O John McQueary
212 Seneca Circle
State College PA 16801

RE: Employment

Draft Statement

Generate Final Bill **Yes** No

Put statement on HOLD

Adjust billed amount to $_____
including expenses or plus expenses

Other comments: _____

--- Legal Fees ---

				Rate	Hours	
A	08/01/2012	EAS	Draft notice of breach to opposing counsel (Conrad); conference call with client and Attorney Fleming	275.00	0.80	220.00
B	08/13/2012	EAS	Research	275.00	1.40	385.00
C	08/14/2012	EAS	Conference call with client and Attorney Fleming	275.00	0.70	192.50
D	08/15/2012	EAS	Draft Contingency Fee Agreement	275.00	1.30	357.50
E	08/16/2012	EAS	Complete Contingency Fee Agreement; e-mail to Fleming and client	275.00	1.50	412.50
F	08/17/2012	EAS	Telephone conference with Fleming; draft letter for client to send to COBRA	275.00	0.60	165.00
G	08/20/2012	JAN	Research re: Defamation by Conduct and Causes of Action	190.00	3.10	589.00
H	08/21/2012	EAS	Extended conference with Attorney Fleming; research	275.00	2.00	550.00
I	08/27/2012	JAN	Research Torts/Restatement	190.00	2.20	418.00
		EAS	Begin work on drafting complaint	275.00	3.00	825.00
J	08/28/2012	JAN	Research re: Prima Facie Tort	190.00	0.70	133.00
		EAS	Review cases and research; continue to work on Complaint	275.00	2.20	605.00
K	08/29/2012	EAS	Continue to work on Complaint	275.00	0.80	220.00
L	08/30/2012	EAS	Work on Complaint	275.00	4.00	1,100.00

(14)

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	09/05/2012	EAS	Review letters from Conrad re: severance and COBRA; e-mail to client; conference call with client	275.00	1.70	467.50
B	09/06/2012	EAS	Work on salary calculations; review coach data base; work on Complaint	275.00	6.00	1,650.00
C	09/07/2012	EAS	Work on Complaint	275.00	2.50	687.50
D	09/09/2012	EAS	Work on Complaint	275.00	3.00	825.00
E	09/10/2012	EAS	Work on Complaint	275.00	1.00	275.00
F	09/11/2012	EAS	Work on Complaint	275.00	3.00	825.00
G	09/12/2012	EAS	E-mails to client re: [redacted]	275.00	0.10	27.50
H	09/16/2012	EAS	Review COBRA notice; telephone conference with client	275.00	0.60	165.00
I	09/20/2012	EAS	Work on Complaint	275.00	3.00	825.00
J	09/21/2012	EAS	Work on Complaint	275.00	4.00	1,100.00
K	09/24/2012	EAS	Work on Complaint	275.00	1.50	412.50
L	09/25/2012	EAS	Work on Complaint; letter to ECS re: COBRA	275.00	3.00	825.00
M	09/27/2012	EAS	Complete Parts II and III of Complaint	275.00	4.50	1,237.50
N	09/28/2012	EAS	Finalize Complaint revisions	275.00	1.00	275.00
O	10/01/2012	EAS	Telephone conference with County Court Administrator re: local 1018.1 Notice; draft notice, civil sheet	275.00	0.30	82.50
P	10/02/2012	EAS	E-mail from/to client re: [redacted]	275.00	0.50	137.50
Q	10/12/2012	EAS	Extended conference call with client and Fleming; review local rules; review file	275.00	0.70	192.50
R	10/26/2012	JAN	Research	190.00	0.40	76.00
		EAS	Begin work/research re: to Motion to Stay	275.00	2.50	687.50
S	10/29/2012	EAS	Work on Answer to Motion to Stay	275.00	2.50	687.50
T	10/30/2012	EAS	Work on Answer to Motion to Stay	275.00	2.50	687.50
U	10/31/2012	EAS	Complete answer to Motion to Stay	275.00	5.00	1,375.00
V	11/05/2012	EAS	Telephone conference with Court Administrator re: postponement of hearing; telephone conference with client re: [redacted] e-mail to Fleming re: [redacted]	275.00	0.30	82.50
W	11/08/2012	EAS	E-mail to client and Fleming re: [redacted]	275.00	0.10	27.50
X	11/14/2012	JAN	Research Philadelphia Court of Common Pleas docket sheets	190.00	0.70	133.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A		EAS	Complete research re: motion to stay (Philadelphia Common Pleas cases; work on argument prep	275.00	2.30	632.50
B	11/15/2012	EAS	Continue argument prep; review Hyman's brief filed in "Miller v 2nd Mile et al" Philadelphia case	275.00	2.60	715.00
C	11/16/2012	EAS	Prepare for and present oral argument re: answer to motion to stay; conference with client in State College	275.00	9.50	2,612.50
D	12/11/2012	EAS	Telephone conference with client re: [redacted]	275.00	0.30	82.50
E	12/20/2012	EAS	Read/analyze Opinion; conference call with client and Attorney Fleming re: [redacted]	275.00	1.30	357.50
F	12/26/2012	EAS	Telephone conference with Attorneys Conrad and George Morrison re: preliminary objections extension until 1/15/13	275.00	0.10	27.50
G	01/09/2013	EAS	E-mail from/to client re: [redacted]	280.00	0.10	28.00
H	01/14/2013	EAS	Research preliminary objection briefing, etc	280.00	0.30	84.00
I	01/15/2013	EAS	Begin review of preliminary objections/analysis; telephone conference with McQueary and Fleming	280.00	1.60	448.00
J	01/16/2013	EAS	Research preliminary objections	280.00	2.00	560.00
K	01/17/2013	EAS	Research preliminary objections	280.00	3.00	840.00
L	01/21/2013	EAS	Research re: preliminary objections	280.00	2.00	560.00
M	01/22/2013	EAS	Research preliminary objections	280.00	2.00	560.00
N	01/25/2013	EAS	Research preliminary objections	280.00	2.50	700.00
O	01/31/2013	EAS	Research; telephone conference with client; draft answer to preliminary objections	280.00	2.50	700.00
P	02/04/2013	EAS	Review briefing schedule	280.00	0.10	28.00
Q	02/05/2013	EAS	Telephone conference with client re: [redacted]	280.00	0.40	112.00
R	02/21/2013	EAS	Review brief in support of preliminary objections; e-mails to and from client	280.00	2.20	616.00
S	02/25/2013	JAN	Research opposing counsel's citations in preliminary objections	200.00	1.80	360.00
		EAS	Research	280.00	3.00	840.00
T	02/26/2013	JAN	Research opposing counsel's citations in preliminary objections; research public/private figures	200.00	2.90	580.00
		EAS	Research	280.00	5.00	1,400.00
U	02/27/2013	EAS	Research	280.00	3.30	924.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	02/28/2013	JAN	Research for opposition to preliminary objections	200.00	1.90	380.00
		EAS	Research	280.00	2.00	560.00
B	03/04/2013	EAS	Work on brief; telephone conference with Attorney Schmidt re: victim 6's allegations	280.00	7.00	1,960.00
C	03/05/2013	EAS	Work on preliminary objections brief	280.00	7.00	1,960.00
D	03/06/2013	JAN	Research for opposition to preliminary objections	200.00	0.50	100.00
		EAS	Work on preliminary objections brief	280.00	7.00	1,960.00
E	03/07/2013	JAN	Work on brief	200.00	2.20	440.00
		EAS	Complete brief	280.00	7.50	2,100.00
F	03/13/2013	EAS	Research; argument prep; telephone conference with client and Fleming	280.00	2.50	700.00
G	03/14/2013	EAS	Prepare for argument	280.00	4.00	1,120.00
H	03/15/2013	EAS	Review PSU's reply Brief	280.00	1.30	364.00
I	03/17/2013	EAS	Telephone conference with client re: [redacted]	280.00	0.20	56.00
J	03/18/2013	EAS	Prepare for and argue case in Bellefonte; conference with client and John McQueary in State College; travel to and from	280.00	10.80	3,024.00
K	03/19/2013	EAS	Telephone conference with client re: [redacted]	280.00	0.60	168.00
L	03/20/2013	EAS	Internet research re: other assistant coaches	280.00	1.50	420.00
M	03/28/2013	EAS	Continue research; begin work on discovery	280.00	1.30	364.00
N	04/16/2013	EAS	Review Judge's decision re: preliminary objections; e-mail to client re: [redacted]	280.00	0.40	112.00
O	04/24/2013	EAS	Conference call with client and Fleming re: [redacted]	280.00	0.70	196.00
P	05/06/2013	EAS	Review Answer/check rule re: verification	280.00	0.90	252.00
Q	05/07/2013	EAS	PaRCP 1024 review; conference with client and Fleming; letter to opposing counsel re: verification	280.00	2.00	560.00
R	05/08/2013	EAS	Complete research re: 1024 and preliminary objections	280.00	1.50	420.00
S	05/13/2013	JAN	Research verification	200.00	0.70	140.00
T	05/14/2013	EAS	Review verification and revisit Answer with New Matter	280.00	1.60	448.00
U	05/15/2013	EAS	Research re: Fixed Term and Standing Appointment	280.00	2.00	560.00
V	05/16/2013	EAS	Begin work on reply to New Matter; e-mails to client and Fleming re: [redacted]	280.00	2.40	672.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	05/17/2013	EAS	Continue Fixed Term and Standing Appointment research	280.00	2.00	560.00
B	05/20/2013	EAS	Work on Reply; conference call with client and Attorney Fleming	280.00	2.10	588.00
C	05/21/2013	EAS	Work on Reply	280.00	3.00	840.00
D	05/22/2013	EAS	Brief conference with client re: [redacted] work on Document Discovery Request	280.00	3.30	924.00
E	05/23/2013	EAS	Complete Document Discovery Request	280.00	4.00	1,120.00
F	05/28/2013	EAS	E-mail from/to/from client; Research re: actual damages	280.00	1.10	308.00
G	06/03/2013	EAS	Telephone conference with client re: [redacted] research	280.00	0.50	140.00
H	06/12/2013	EAS	Review "actual damages" cases	280.00	0.70	196.00
I	06/25/2013	EAS	Prepare for and conference with Conrad re: her 45 day extension request; telephone conference with client	280.00	1.00	280.00
J	06/27/2013	EAS	Conference with call with opposing counsel re: production of documents	280.00	0.30	84.00
K	06/28/2013	EAS	Letter to opposing counsel (Conrad); review Confidentiality Agreement; e-mail to opposing counsel	280.00	1.10	308.00
L	07/02/2013	EAS	Telephone conference with client and Fleming re: [redacted]	280.00	0.40	112.00
M	07/08/2013	EAS	Review 7/2 e-mail from opposing counsel re: confidentiality agreement; review e-mail from client of 7/3	280.00	0.30	84.00
N	07/10/2013	EAS	Begin draft confidentiality agreement	280.00	0.70	196.00
O	07/11/2013	EAS	Complete draft Confidentiality Agreement	280.00	1.00	280.00
P	07/15/2013	EAS	Review Agreement drafted by opposing counsel (Conrad); letter to opposing counsel (Conrad); review Confidentiality Agreement	280.00	1.20	336.00
Q	07/16/2013	EAS	Review response to our request for production; begin review client's Personnel File	280.00	1.50	420.00
R	07/17/2013	EAS	Review response to production of documents	280.00	2.00	560.00
S	07/18/2013	EAS	Complete review of Personnel File	280.00	1.00	280.00
T	07/19/2013	EAS	Telephone conference with client re [redacted]	280.00	0.30	84.00
U	07/22/2013	EAS	Telephone conference with Fleming re: [redacted]	280.00	0.30	84.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	07/23/2013	EAS	Research and draft response to opposing counsel re: confidentiality agreement	280.00	3.60	1,008.00
B	07/29/2013	EAS	Conference with client; telephone conference with opposing counsel (Conrad); telephone conference with client	280.00	2.00	560.00
C	07/30/2013	EAS	Telephone conference with client	280.00	0.20	56.00
D	08/08/2013	EAS	Review/analyze latest version of Confidentiality Agreement and e-mail to opposing counsel	280.00	0.80	224.00
E	08/19/2013	CER	Meeting with EAS re: severance questions; research on WestLaw and PA Code	95.00	1.50	142.50
		EAS	Follow-up on confidentiality agreement	280.00	0.10	28.00
F	08/20/2013	CER	Research and draft memo re: unemployment comp and severance	95.00	2.50	237.50
		EAS	Telephone conference with counsel; research re: UC; conference call with client and Tim Fleming	280.00	1.50	420.00
G	08/21/2013	EAS	Letter to opposing counsel re: Confidentiality Agreement; final review personnel file for missing pages/documents	280.00	0.80	224.00
H	08/26/2013	EAS	Telephone conference with Conrad re: sending discovery out tomorrow	280.00	0.10	28.00
I	08/28/2013	EAS	Review discovery produced and requested by PSU; telephone conference with T. Fleming; telephone conference with client	280.00	2.50	700.00
J	09/03/2013	EAS	Work on/analysis of discovery request	280.00	2.00	560.00
K	09/04/2013	EAS	Continue work on discovery request	280.00	1.60	448.00
L	09/09/2013	EAS	Work on discovery	280.00	4.60	1,288.00
M	09/10/2013	EAS	Continue work on discovery	280.00	2.70	756.00
N	09/12/2013	EAS	Conference with client	280.00	3.00	840.00
O	09/19/2013	EAS	Review text message; conference with client revise documents and first run through of interrogatories	280.00	1.70	476.00
P	09/20/2013	EAS	Review e-mails from T F; telephone conference with T F	280.00	0.30	84.00
Q	09/23/2013	EAS	Review e-mail from Attorney Conrad; e-mail to Conrad	280.00	0.20	56.00
R	09/24/2013	EAS	Work on document request	280.00	2.50	700.00
S	09/25/2013	EAS	Work on discovery; e-mail to opposing counsel (Conrad) re: extension	280.00	2.00	560.00
T	09/30/2013	EAS	Work on discovery	280.00	2.00	560.00
U	10/01/2013	EAS	Conference with client re: [redacted]	280.00	3.50	980.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	10/03/2013	EAS	Telephone conference with Attorney Yurchak's office; letter to Attorney Yurchack re: Sherburne Deposition	280.00	0.50	140.00
B	10/04/2013	EAS	Work on discovery; telephone conference with Tim re: [redacted]	280.00	1.00	280.00
C	10/07/2013	EAS	E-mail to client re: [redacted] telephone conference with client; work on discovery; telephone conference with Deputy Attorney General Beemer confirming Grand Jury testimony privilege	280.00	2.00	560.00
D	10/08/2013	CER	Research re: admissibility of Grand Jury and trial court documents	95.00	2.80	266.00
		EAS	Continue work on discovery; telephone conference with Attorney Conrad re: deposition date; letter to Attorney Yurchak	280.00	3.00	840.00
E	10/09/2013	EAS	Telephone conference with opposing counsel (Conrad); e-mails/etc re: depositions; e-mail to client; work on answer to discovery	280.00	1.00	280.00
F	10/10/2013	EAS	Work on answer to discovery	280.00	3.50	980.00
G	10/15/2013	EAS	Continue work on discovery	280.00	2.50	700.00
H	10/16/2013	EAS	Work on discovery	280.00	2.40	672.00
I	10/17/2013	CER	Meeting with EAS	95.00	0.20	19.00
		EAS	Conference with client re: [redacted] work on request for production; telephone conference with Tim and court reporter	280.00	3.80	1,064.00
J	10/18/2013	CER	Research news/blog data	95.00	2.40	228.00
		EAS	Work on answer to interrogatories; research re: interrogatories	280.00	2.70	756.00
K	10/21/2013	CER	Research	95.00	0.60	57.00
		EAS	Telephone conferences with client; complete Document Production and Answers	280.00	5.00	1,400.00
L	10/22/2013	EAS	Prepare deposition notice; telephone conference with Attorney Conrad; prepare subpoena	280.00	1.50	420.00
M	10/23/2013	EAS	Telephone conference with Fleming re: [redacted]	280.00	0.30	84.00
N	10/30/2013	EAS	Draft Confidentiality Agreement for Court reporter; e-mail same to Tim Fleming	280.00	1.00	280.00
O	10/31/2013	EAS	E-mails to Court reporter; telephone confernce with client re: [redacted] deposition preparation; telephone conference with opposing counsel (Conrad & Morrison) re: additional supplemental production	280.00	3.00	840.00
P	11/04/2013	EAS	Prepare for Sherburne deposition; review latest discovery			

Michael McQueary

RE: Employment

				Rate	Hours	
			(app 236 pages); e-mail to opposing counsel re: missing 2 pages; take Sherburne deposition	280.00	8.50	2,380.00
A	11/05/2013	EAS	Review recent discovery produced; prepare for Runkle and Joyner depositions	280.00	3.80	1,064.00
B	11/06/2013	EAS	Take Runkle and Joyner depositions in State College	280.00	11.50	3,220.00
C	11/11/2013	EAS	E-mails to Court reporter; research re: proof od defamation damages	280.00	2.80	784.00
D	11/12/2013	EAS	Research re: internet defamation; telephone conference with client	280.00	2.50	700.00
E	11/14/2013	EAS	Telephone conference with client re: [redacted] e-mails to court reporter; cursory review of Sherburne deposition	280.00	1.60	448.00
F	11/20/2013	EAS	Telephone conference with client re: [redacted]	280.00	0.30	84.00
G	11/21/2013	EAS	Internet research re: defamation	280.00	3.00	840.00
H	11/25/2013	EAS	E-mail to Tim Fleming re: [redacted]eview privilege log	280.00	0.60	168.00
I	11/27/2013	EAS	Draft and send deposition notice for Doncsecz; telephone conference with Ganter's attorney (Massineo)	280.00	0.70	196.00
J	12/02/2013	EAS	Telephone conferences with Ganter's Attorney Messinio re: deposition on 12/10; telephone conference with client re: [redacted]	280.00	0.50	140.00
K	12/03/2013	EAS	E-mail to opposing counsel re: Doncsecz; letter to client re: [redacted]	280.00	0.70	196.00
L	12/05/2013	EAS	E-mail to client re: [redacted]	280.00	0.40	112.00
M	12/09/2013	EAS	Prepare for deposition	280.00	2.00	560.00
N	12/10/2013	EAS	Deposition of Ganter and Doncsecz in State College	280.00	8.00	2,240.00
O	12/16/2013	EAS	Telephone conference with client re: [redacted]	280.00	0.60	168.00
P	12/17/2013	EAS	Brief telephone conference with Conrad last payment (courtesy)	280.00	0.10	28.00
Q	01/03/2014	EAS	Work on additional discovery issue	290.00	2.50	725.00
R	01/06/2014	EAS	Research re: Spanier, Curley, and Schultz motions	290.00	1.30	377.00
S	01/09/2014	EAS	Conference call with client and Tim Fleming	290.00	0.60	174.00
T	01/13/2014	EAS	Begin review Ganter transcript	290.00	0.70	203.00
U	01/14/2014	EAS	Complete Ganter transcript; letter to client re: [redacted] begin			

				Rate	Hours	
			letter to Beemer	290.00	2.50	725.00
A	01/16/2014	EAS	Draft letter to Beemer	290.00	0.50	145.00
B	01/20/2014	EAS	Review documents re: additional discovery	290.00	1.30	377.00
C	01/21/2014	EAS	Assemble and send [redacted] to client	290.00	1.00	290.00
D	01/23/2014	EAS	Telephone conference with Messineo re: Gag order	290.00	0.40	116.00
E	01/24/2014	EAS	Review Freeh report for Spanier libel detail	290.00	2.00	580.00
F	01/27/2014	JAN	Work on request for admission	225.00	1.60	360.00
		EAS	Work on draft request for Admission; telephone conference with client	290.00	0.80	232.00
G	02/03/2014	EAS	Review Grand Jury documents re: potential witness statements	290.00	2.00	580.00
H	02/04/2014	EAS	Review of transcripts for potential witnesses	290.00	2.00	580.00
I	02/06/2014	CER	Work on Dauphin County document search; telephone conference with Shaffer re: transcript for Spanier's	125.00	0.20	25.00
J	02/07/2014	CER	Call to Dauphin County Courthouse to follow up on transcript requests, left voice mail	125.00	0.10	12.50
K	02/10/2014	CER	Telephone conference with Brenda Shaffer	125.00	0.50	62.50
		EAS	Conference call with client and Fleming	290.00	0.50	145.00
L	02/11/2014	CER	Order transcript from Brenda Shaffer	125.00	0.30	37.50
M	02/14/2014	CER	Pick up transcript from Dauphin County Courthouse	125.00	0.70	87.50
		EAS	Begin read preliminary hearing transcripts (7/29/13)	290.00	2.50	725.00
N	02/17/2014	EAS	Review U Pa Dept of Communications faculty and TASA for potential experts	290.00	1.00	290.00
O	02/18/2014	EAS	Continue 7/29/13 transcript and begin 7/30/13 transcripts	290.00	2.50	725.00
P	02/19/2014	EAS	Complete 7/30 and 7/29 transcripts	290.00	3.50	1,015.00
Q	02/20/2014	EAS	E-mail to Mike re [redacted]; e-mails to Tim re: [redacted] letter to Beemer; telephone conference with Beemer	290.00	2.00	580.00
R	02/24/2014	EAS	Telephone conference with Fleming re: [redacted] work on discovery request	290.00	4.00	1,160.00
S	02/25/2014	EAS	Review transcripts re: inconsistencies with media reprints of testimony	290.00	2.50	725.00
T	02/26/2014	EAS	Conference call with client and Fleming re: [redacted]	290.00	0.40	116.00

Michael McQueary

December 12, 2016
Account No: 2716-00M
Statement No: 30987

RE: Employment

				Rate	Hours	
A	02/27/2014	EAS	E-mail to client; telephone conference with client; research	290.00	1.50	435.00
B	03/07/2014	EAS	Telephone conference with Fleming re: [redacted]; review ESPN article; telephone call to Beemer (not in - in Pittsburgh today)	290.00	1.30	377.00
C	03/10/2014	EAS	Review Beemer letter; review Centre Daily Times article; e-mail to client and Fleming	290.00	1.00	290.00
D	03/12/2014	EAS	Work on discovery request	290.00	1.00	290.00
E	03/13/2014	EAS	Continue expert research	290.00	1.20	348.00
F	03/17/2014	EAS	Complete discovery request	290.00	1.50	435.00
G	03/19/2014	CER	Order and request for documents/interrogatories for Victim 6	125.00	1.10	137.50
		EAS	E-mails to client; read article re: discovery Victim 6 case	290.00	0.70	203.00
H	03/25/2014	EAS	Research re: expert on internet/media impact; work on deposition list; e-mails to client re: [redacted]	290.00	2.00	580.00
I	03/26/2014	EAS	E-mails to and Tim re: [redacted] work on expert witness for mediation	290.00	2.50	725.00
J	04/02/2014	EAS	Telephone conference with Conrad re: extension on discovery and deposition	290.00	0.10	29.00
K	04/03/2014	JAN	Consult with EAS	225.00	0.60	135.00
		EAS	Work on expert	290.00	2.00	580.00
L	04/04/2014	JAN	Research Media Expert	225.00	0.20	45.00
M	04/07/2014	EAS	Legal research	290.00	3.00	870.00
N	04/08/2014	CER	Research pulling cases for EAS	125.00	0.10	12.50
		EAS	Telephone conference with Tim Fleming re: [redacted] expert search and Joseph v Scranton Times case	290.00	1.00	290.00
O	04/09/2014	JAN	Research/expert witness	225.00	0.60	135.00
P	04/10/2014	JAN	Expert search	225.00	0.40	90.00
		EAS	Research; telephone conference with Victim 9 Attorney Raynes; telephone conference with client	290.00	1.00	290.00
Q	04/11/2014	JAN	Expert search	225.00	3.00	675.00
R	04/15/2014	EAS	Telephone conference with [redacted] e-mail to client; research	290.00	1.00	290.00
S	04/16/2014	EAS	Continue research	290.00	2.00	580.00
T	04/17/2014	EAS	Research	290.00	2.00	580.00
U	04/21/2014	EAS	Research re: expert	290.00	1.50	435.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

			Rate	Hours	
A 04/22/2014	JAN	Research Media Expert	225.00	1.80	405.00
	EAS	Telephone conference with client; telephone conference with Fleming re: [redacted] letter to Erickson's and Baldwin's attorneys re: depositions; research	290.00	0.10	29.00
B 04/23/2014	JAN	Research Media Expert	225.00	1.50	337.50
	EAS	Conference in State College with Dr. Dranov; conference with client	290.00	7.00	2,030.00
C 04/24/2014	EAS	Conference with Victim 9 attorney, Raynes; draft letters to Lisa Power's attorney	290.00	2.00	580.00
D 05/01/2014	EAS	Telephone message to Dr. Erickson's attorney; review and download article re: ESPN; research re: media expert	290.00	1.50	435.00
E 05/05/2014	EAS	Review Janove e-mail re: Powers deposition; e-mail to Fleming re: [redacted]	290.00	0.10	29.00
F 05/06/2014	EAS	E-mail re: Powers deposition	290.00	0.20	58.00
G 05/12/2014	EAS	Firm up Harmon deposition; telephone conference with Conrad	290.00	0.40	116.00
	JAN	Research re: expert	225.00	1.00	225.00
H 05/13/2014	EAS	Review e-mail from Conrad; draft letter to Horvath's consel	290.00	0.40	116.00
I 05/15/2014	EAS	Conference with JAN re: [redacted] review letter from Harmon's attorney; extended telephone conference with attorney for Horvath (John Barr); letter to DeMonnaca extended telephone conference with Bruce Beemer re: Baldwin; extended telephone conference with Virginia Gibson re: Evidence; telephone conference with Fleming	290.00	4.50	1,305.00
J 05/16/2014	EAS	Deposition notice for Harman; review Powers preliminary hearing testimony; draft Powers deposition notice; telephone conferences with client re: [redacted] e-mail to Conrad re: Erickson deposition	290.00	2.80	812.00
K 05/29/2014	EAS	Review discovery; research	290.00	2.00	580.00
L 05/30/2014	EAS	Telephone conference with client; telephone conference with Baldwin's attorney; research re: media expert	290.00	3.00	870.00
	JAN	Research	225.00	4.60	1,035.00
M 06/02/2014	JAN	Research re: privilege/work product; work on memo	225.00	5.90	1,327.50
	EAS	Research; telephone conference with Baldwin's attorney; review draft MSA	290.00	2.00	580.00
N 06/03/2014	JAN	Work on memo	225.00	1.20	270.00
	EAS	Research; work on discovery failures, expert witness	290.00	3.00	870.00
O 06/04/2014	JAN	Work on memo; research re: internet/twitter communication	225.00	3.10	697.50
	EAS	Telephone conference with Fleming; telephone message to Ganter's attorney (Messineo); telephone conference with Baldwin's attorney (Tintner)	290.00	1.00	290.00

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Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	06/05/2014	EAS	Draft Erickson Notice of Deposition	290.00	0.20	58.00
B	06/09/2014	EAS	Telephone conference with Messineo re: Ganter deposition; e-mails to Conrad re: continuation of Ganter deposition	290.00	0.30	87.00
C	06/10/2014	EAS	Review Powers and Harmon preliminary hearing transcripts	290.00	2.00	580.00
D	06/12/2014	EAS	Brief telephone conference with McCabe for Mitts Law firm	290.00	0.20	58.00
E	06/16/2014	EAS	Prepare for depositions	290.00	2.50	725.00
F	06/17/2014	EAS	Prepare for depositions; telephone conference with [redacted]	290.00	2.50	725.00
G	06/18/2014	JAN	Research re: client's internet history	225.00	1.00	225.00
		EAS	Continue deposition prep (complete Harmon testimony review)	290.00	3.00	870.00
H	06/19/2014	EAS	Take Powers and Ganter's resumed deposition in State College; interview [redacted]	290.00	9.50	2,755.00
I	06/20/2014	JAN	Research internet history pre and post November 2011	225.00	0.70	157.50
		EAS	Prepare for and take Harmon deposition	290.00	3.00	870.00
J	06/23/2014	JAN	Work on memo re: attorney client privilege/attorney work product	225.00	0.40	90.00
		EAS	E-mail to client; telephone conference with [redacted] research re: attorney client privilege	290.00	2.30	667.00
K	06/24/2014	EAS	Begin draft letter to Conrad; telephone conference with client and Fleming; begin review Kane Report	290.00	2.70	783.00
L	06/25/2014	EAS	Complete work on letter to opposing counsel (Conrad) re: discovery	290.00	2.00	580.00
M	07/07/2014	EAS	E-mail to Baldwin attorney re: deposition dates	290.00	0.10	29.00
N	07/08/2014	EAS	Telephone conference with Fleming re: [redacted]	290.00	0.20	58.00
O	07/15/2014	EAS	Prepare for and telephone conference with opposing counsel (Conrad) re: discovery responses	290.00	1.00	290.00
		CER	Research re: foreign subpoena	125.00	2.10	262.50
P	07/16/2014	EAS	Research	290.00	1.00	290.00
		CER	Research re: foreign jurisdiction subpoena	125.00	0.40	50.00
Q	07/17/2014	EAS	E-mail to Baldwin attorney (Tintner); draft letter to Baldwin's attorney	290.00	2.70	783.00
R	08/04/2014	EAS	Telephone conference with Court Reporter re: Powers exhibits	290.00	0.20	58.00
S	08/07/2014	CER	Foreign deposition research under Uniform Interstate Deposition and Discovery Act	125.00	0.20	25.00

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Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	08/08/2014	EAS	Telephone conference with client and Fleming re: [redacted]	290.00	0.50	145.00
		CER	Foreign deposition research	125.00	0.30	37.50
B	08/18/2014	EAS	Telephone conference with Va. Gibson; e-mail Conrad; e-mail Tintner; research re: damages/Washington DC deposition	290.00	1.30	377.00
C	08/20/2014	EAS	E-mail to opposing counsel; telephone message to opposing counsel (Conrad/not in); telephone message to Erickson's attorney (not in)	290.00	1.00	290.00
D	08/27/2014	EAS	Internet resaerch re: Brett Senior	290.00	1.60	464.00
E	08/28/2014	EAS	E-mail exchanges with Bob Tinther re: Baldwin deposition; e-mail Gibson re: Erickson deposition; continue expert research	290.00	2.00	580.00
F	09/03/2014	EAS	Review privilege log; draft Baldwin deposition notice	290.00	2.50	725.00
G	09/05/2014	EAS	Extended telephone conference with [redacted] attorney; telephone conference with client	290.00	0.40	116.00
H	09/08/2014	EAS	Letter to opposing counsel, Conrad re: discovery disputes	290.00	0.40	116.00
I	09/11/2014	EAS	Begin review discovery material; review privilege log; e-mail opposing counsel re: 2 missing entries privilege log	290.00	2.50	725.00
J	09/12/2014	EAS	Review discovery; letter to opposing counsel	290.00	1.50	435.00
K	09/16/2014	EAS	Telephone conference with Tintner re: Baldwin deposition; telephone conference with Fleming re: [redacted]	290.00	0.40	116.00
L	09/17/2014	EAS	Telephone conference with Tintner, Beemer and Fleming re: baldwin deposition	290.00	0.40	116.00
M	09/22/2014	EAS	Review letter from Judge Gavin; e-mail Fleming re: [redacted] review letter from Tintner and forward [redacted] to Fleming; telephone conference with Tintner; telephone conference with Fleming	290.00	1.00	290.00
N	09/23/2014	EAS	Telephone conference with client and Fleming	290.00	0.50	145.00
O	09/24/2014	EAS	Telephone conference with client and Tim; telephone conference with Tintner; letter to Judge Gavin re: status	290.00	1.40	406.00
P	10/01/2014	EAS	Extended telephone conference with opposing counsel (Conrad); telephone conference with Fleming re [redacted] e-mails to Gibson re: deposition	290.00	1.00	290.00
Q	10/03/2014	EAS	Work on prep for Erickson deposition	290.00	3.00	870.00
R	10/07/2014	EAS	Prepare for and take Erickson Deposition in State College	290.00	7.00	2,030.00
S	10/16/2014	EAS	Telephone conference with Beemer re: expected date of J.			

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
			Hoover's decision	290.00	0.20	58.00
A	11/04/2014	EAS	Conference with client and Fleming re: [redacted]	290.00	0.30	87.00
B	11/12/2014	EAS	Review e-mails from client and Nancy Conrad; telephone conference with client and Fleming re: [redacted]	290.00	1.30	377.00
C	11/13/2014	EAS	E-mail response to Conrad re: discovery dispute	290.00	0.50	145.00
D	11/14/2014	EAS	Respond to opposing counsel's e-mail re: unresolved discovery issues	290.00	0.60	174.00
E	11/18/2014	EAS	Review/analyze Brett Senior packet and job search packet	290.00	2.00	580.00
F	11/19/2014	EAS	Telephone message to [redacted] begin work on Motion to Compel; e-mail to client	290.00	1.50	435.00
G	11/20/2014	EAS	Work on Motion to Compel	290.00	1.70	493.00
H	11/25/2014	CER	Research McCord v. NCAA decision	125.00	0.20	25.00
I	11/26/2014	EAS	Review recent discovery produced by PSU	290.00	1.00	290.00
J	12/01/2014	EAS	Work on Motion to Compel; e-mail to opposing counsel re: motion	290.00	3.00	870.00
K	12/02/2014	EAS	Work on Motion to Compel	290.00	2.00	580.00
L	12/03/2014	EAS	E-mail to opposing counsel; finalize Motion to Compel and Motion to Seal	290.00	2.00	580.00
M	12/04/2014	EAS	Telephone conference with Tim re [redacted] telephone conference with client; telephone conference with Prothonotary re: Motion to Compel; draft Certificate of Service for Motion to Seal	290.00	1.00	290.00
N	12/10/2014	EAS	Further research re: attorney client/work product	290.00	2.40	696.00
O	12/11/2014	EAS	E-mail to Fleming re: [redacted]	290.00	0.10	29.00
P	12/15/2014	EAS	E-mail to Fleming; telephone conference with Fleming re: [redacted]	290.00	0.20	58.00
Q	12/16/2014	EAS	Telephone conference with Fleming re: [redacted] telephone conference with client re: [redacted]; e-mail from/to client re: [redacted] new research attorney client/work product	290.00	1.90	551.00
R	12/17/2014	EAS	Begin review Harmon deposition in victim's case	290.00	2.00	580.00
S	12/18/2014	EAS	Telephone conference with Conrad re: Judge Gavin's letter	290.00	0.30	87.00
T	12/22/2014	EAS	Telephone conference with Harman's attorney re: continuing			

Michael McQueary

RE: Employment

				Rate	Hours	
			deposition	290.00	0.20	58.0
A	12/31/2014	EAS	Telephone conference with Attorney [redacted]	290.00	0.20	58.0
B	01/05/2015	EAS	Review possible AD witness.	300.00	1.50	450.0
C	01/06/2015	EAS	E-mail to client re: [redacted]	300.00	0.20	60.0
D	01/07/2015	EAS	Telephone conference with Harman's attorney re: resuming deposition	300.00	0.10	30.0
E	01/08/2015	EAS	Complete Harman deposition in John Doe case; letter to Brigham; conference with JLC re: [redacted]	300.00	2.00	600.0
F	01/13/2015	EAS	Continue check on possible AD witness	300.00	1.20	360.0
G	01/14/2015	EAS	File review re: [redacted]	300.00	2.00	600.0
H	01/15/2015	CER	Judge Hoover's opinion in Spanier, Curley, Shultz cases	150.00	0.20	30.0
		EAS	Review discovery responses to prepare for conference with Judge Gavin; review Judge Hoover's opinion	300.00	2.70	810.0
I	01/19/2015	EAS	Meeting with [redacted] conference with client re: [redacted]	300.00	7.00	2,100.0
J	01/20/2015	EAS	Discovery conference with Judge Gavin in West Chester	300.00	6.50	1,950.0
K	01/21/2015	EAS	Review Harman exhibits; telephone conference with client	300.00	0.70	210.0
L	01/22/2015	EAS	Draft Bradley deposition request to Brett Senior; letter to opposing counsel (Conrad)	300.00	0.80	240.0
M	01/23/2015	CER	Research Lanny Davis, Esq. admission in Pennsylvania	150.00	0.50	75.0
N	01/27/2015	EAS	Complete letter to opposing counsel (Conrad) re: deposition	300.00	0.20	60.0
O	01/29/2015	EAS	Review documents sent in by client re [redacted]	300.00	0.60	180.0
P	02/04/2015	EAS	Research [redacted] current business address; telephone conference with Tom Bradley's attorney - Winning - letter to Conrad re: Bradley deposition	300.00	0.80	240.0
Q	02/12/2015	EAS	Telephone message [redacted]	300.00	0.10	30.0
R	02/13/2015	EAS	Telephone conference with [redacted] review Farrell letter; e-mail to Tim and Mike	300.00	1.00	300.00
S	02/23/2015	EAS	Review and analyze PSU brief re: Motion to Compel; review Farrell and Roberto letters; e-mail to opposing counsel re: Bradley's deposition and Mike's deposition in John Doe case	300.00	4.40	1,320.00
T	02/24/2015	EAS	Continue work on product/Commm defense research	300.00	2.00	600.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	02/25/2015	EAS	Telephone conference with Conrad re: hearing on Motion to Compel and possible depositions	300.00	0.30	90.00
		CER	Research Pennsylvania Manufacturer's Association Ins. v. PSU for subpoena	150.00	1.50	225.00
B	02/26/2015	EAS	Telephone conference with client and Tim re: [redacted]	300.00	0.50	150.00
C	03/02/2015	EAS	First draft reply to request for depositions	300.00	0.30	90.00
D	03/03/2015	EAS	Draft letter to PMA and telephone conference with attorney for John Doe 1 re: taking Mike's deposition	300.00	1.00	300.00
E	03/04/2015	EAS	Research re: work product	300.00	1.20	360.00
F	03/05/2015	JAN	Research re: Proof of Damages	235.00	5.90	1,386.50
		EAS	Extended telephone conference with Beemer; continue work on attorney client/work on production	300.00	2.50	750.00
G	03/06/2015	JAN	Research	235.00	5.50	1,292.50
H	03/09/2015	JAN	Research Proof of Damages, actual Malice	235.00	2.30	540.50
		EAS	Two telephone conferences with Tim re: [redacted]	300.00	0.30	90.00
I	03/10/2015	EAS	Review letter from Judge Gavin; review Conrad letter; review Farrell and Roberts letters; begin draft response	300.00	0.70	210.00
J	03/11/2015	EAS	Research; finalize letter to Judge Gavin re: participants at hearing	300.00	2.00	600.00
K	03/12/2015	EAS	Continue attorney client research; research AD possibilities	300.00	2.00	600.00
L	03/16/2015	EAS	Continue potential AD research	300.00	2.00	600.00
M	03/17/2015	EAS	Continue research re: Motion to Compel	300.00	2.00	600.00
J	03/18/2015	EAS	Telephone conference with John Doe 4 attorney re: Mike's deposition; e-mail client re: deposition; review our discovery plan	300.00	2.50	750.00
O	03/19/2015	EAS	Letter to PMA Attorney Gagne; telephone conference with Gagne; telephone conference with Attorney Raynes; e-mail to client re: [redacted] second telephone conference with Raynes	300.00	1.00	300.00
P	03/24/2015	EAS	Telephone conference with John Doe 4 attorney; e-mail to client and Tim	300.00	0.30	90.00
Q	03/26/2015	EAS	E-mail from/to opposing counsel	300.00	0.10	30.00
R	03/30/2015	EAS	Review e-mail from Judge re: hearing; e-mail to client and Fleming re: [redacted]	300.00	0.20	60.00
S	04/02/2015	CER	Attorney Registration Letter requesting record of Lanny Davis	150.00	1.20	180.00
T	04/06/2015	CER	Telephone conference with Attorney Registration Office			

Michael McQueary

January 19, 201
Account No: 2716-00l
Statement No: 3115

RE: Employment

				Rate	Hours	
			confirming receipt of fax and stating that an authorized document of non-admission will be mailed to our office	150.00	0.20	30.0
A	04/07/2015	EAS	Work on brief	300.00	1.20	360.0
B	04/08/2015	EAS	Letter to opposing counsel (Conrad) re: witnesses for hearing	300.00	0.20	60.0
C	04/09/2015	CER	Attorney Registration for Eleanor McManus, call and follow up fax	150.00	0.50	75.0
		EAS	Research re: Motion to Compel	300.00	2.00	600.0
D	04/10/2015	EAS	Dictate first draft of brief re: Motion to Compel	300.00	3.00	900.0
E	04/14/2015	EAS	Work on brief; telephone calls to Attorney Janove and Ginny Erickson's office; e-mails to Tim; e-mail to Erickson's attorney's office	300.00	1.20	360.0
F	04/15/2015	CER	Research cases for privilege brief; research ethics decisions by PBA and ABA	150.00	2.80	420.0
		EAS	Work on brief; review "Curley's" petition to intervene	300.00	3.00	900.0
G	04/16/2015	CER	Research for brief	150.00	0.80	120.0
		EAS	Work on Motion to Compel	300.00	3.00	900.0
H	04/17/2015	EAS	Complete brief re: Motion to Compel	300.00	5.70	1,710.0
I	04/20/2015	EAS	Telephone conference with Fleming; research intervenor rules	300.00	1.40	420.0
J	04/21/2015	EAS	Prepare for hearing; conference call with Tim and Mike	300.00	2.00	600.0
K	04/22/2015	EAS	Telephone calls and e-mails with opposing counsel (Conrad) Erickson's attorney and Court re: request for continuance because of Dr. Erickson's health emergency and new hearing date	300.00	3.50	1,050.0
L	04/27/2015	EAS	Review e-mails from Court; e-mail to client; e-mail to Fleming	300.00	0.20	60.0
		EAS	Research issues re: intervenor's arguments	300.00	2.00	600.0
M	04/28/2015	EAS	E-mail to client; research re: common interest defense	300.00	2.00	600.0
N	04/29/2015	EAS	E-mails to Tim and Mike	300.00	0.20	60.0
O	04/30/2015	EAS	E-mails to Tim and Mike; letter to Tintner re: Baldwin Deposition; e-mail from Tintner; reply to Tintner; letter to Winning re: Bradley; telephone conference with Winning re: Bradley deposition in Philadelphia on 5/22	300.00	1.70	510.0
P	05/01/2015	JAN	Research damages	235.00	1.00	235.0
Q	05/05/2015	EAS	Research common (legal) interest	300.00	2.00	600.0
R	05/06/2015	EAS	Conference call with Tim & Mike	300.00	0.50	150.0
S	05/07/2015	EAS	Review Freeh report for documents/requests for admissions	300.00	2.00	600.0

Michael McQueary

RE: Employment

				Rate	Hours	
A	05/11/2015	EAS	Telephone conference with Bradley's attorney; letter to Conrad; telephone conference with Conrad	300.00	0.80	240.0
B	05/13/2015	EAS	Prepare for hearing	300.00	2.00	600.0
C	05/14/2015	EAS	Research; telephone conferences with Tim and telephone conference with Tim and Mike	300.00	2.00	600.0
D	05/18/2015	CER	Keycite cases for hearing; pull PA Disciplinary Rule; Rule of Evidence	150.00	2.50	375.0
		EAS	Telephone conference with Bradley's attorney; prepare for hearing	300.00	2.50	750.0
E	05/19/2015	EAS	Travel to/from Bellefont; hearing on Motion to Compel; telephone conference with Bradley's attorney (Winning); telephone conference with Attorney Gagne re: Bradley's morning deposition	300.00	7.00	2,100.0
F	05/20/2015	EAS	Communicate with Court reporter; conference with Attorney Gagne re: video tape deposition; prepare for Bradley deposition	300.00	1.30	390.0
G	05/21/2015	EAS	Prepare for Bradley deposition	300.00	2.50	750.0
H	05/22/2015	EAS	Prepare for and take Tom Bradley's deposition in Philadelphia	300.00	7.00	2,100.0
I	05/27/2015	EAS	Telephone message to [redacted] review Judge's order; review e-mails; e-mail to client; e-mail exchange with Baldwin's attorney (Tintner); draft notice of deposition	300.00	2.50	750.0
J	05/28/2015	EAS	Continue work on case; conference call with client and Fleming re [redacted]	300.00	2.20	660.0
K	05/29/2015	EAS	E-mails to Attorney Gibson, client, Attorney Gagne, analyze; begin Baldwin deposition prep	300.00	1.30	390.0
L	06/01/2015	JAN	Research damages/defamation	235.00	2.20	517.0
M	06/02/2015	JAN	Research damages/defamation	235.00	5.70	1,339.5
N	06/03/2015	JAN	Research damages/defamation	235.00	4.80	1,128.0
		EAS	E-mail to/from Erickson's attorney re: deposition date	300.00	0.30	90.0
O	06/04/2015	JAN	Begin work on memo	235.00	2.70	634.50
		EAS	Complete Confidentiality Agreement; letter to Attorney Gagno	300.00	2.00	600.00
P	06/05/2015	JAN	Work on memo re: defamation proofs	235.00	2.20	517.00
Q	06/08/2015	EAS	Discovery plan; review discovery document	300.00	1.70	510.00
R	06/11/2015	EAS	E-mail exchanges with PMA (Engelmyer) and PSU Counsel (Romagnoli) re: Mike's deposition	300.00	0.40	120.00
S	06/12/2015	EAS	Conference call with PMA Counsel (Engelmyer and Gagne) and PSU Counsel (Romagnoli)	300.00	0.40	120.00

Michael McQueary

January 19, 2017
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RE: Employment

				Rate	Hours	
A	06/15/2015	EAS	Conference with PMA Counsel (Gagne) and PSU Counsel (Romagnoli); brief telephone conference with Gagne; review Emergency Petition; review Communication from Court; telephone conference with client	300.00	1.50	450.00
B	06/16/2015	JAN	Research work on memo (defamation proofs)	235.00	0.50	117.50
		EAS	Research re: emergency Motion	300.00	2.50	750.00
		CER	Work on Discovery Court, subpoena research	150.00	0.80	120.00
C	06/17/2015	JAN	Work on memo (defamation proofs)	235.00	0.20	47.00
		EAS	E-mail to opposing counsel re: actual confidentiality agreement; review actual confidentiality agreement; begin to prepare for oral argument	300.00	2.00	600.00
D	06/18/2015	EAS	Prepare for hearing on Emergency Petition; letter to Emergency Petition administrator	300.00	3.00	900.00
		JAN	Finish memo	235.00	1.30	305.50
		CER	PMA exhibits from Philadelphia Common Pleas	150.00	0.50	75.00
E	06/19/2015	EAS	Prepare for argument	300.00	1.00	300.00
F	06/22/2015	EAS	Travel to and from Philadelphia; argue PMA/PSU additional confidentiality	300.00	6.75	2,025.00
G	06/23/2015	EAS	Telephone conference with client and Tim re: [redacted].	300.00	0.50	150.00
H	06/24/2015	EAS	Review transcript of oral argument	300.00	0.50	150.00
I	06/25/2015	EAS	Research re: confidentiality order and scope of Mike's deposition	300.00	2.00	600.00
J	06/26/2015	EAS	Review e-mail from Conrad re: Erickson deposition; e-mail to Conrad re: doing other depositions; complete review/analysis of PMA/PSU Confidentiality Agreement	300.00	1.40	420.00
K	06/29/2015	JAN	Research (defamation)	235.00	1.60	376.00
L	07/06/2015	EAS	E-mail to Conrad re: depositions	300.00	0.20	60.00
M	07/07/2015	EAS	Prepare for Erickson deposition	300.00	1.20	360.00
N	07/09/2015	CER	Philadelphia Common pleas case research	150.00	0.50	75.00
		EAS	Conference call with client and Tim re[redacted]	300.00	0.80	240.00
O	07/13/2015	EAS	Prepare for deposition; telephone conference with Gagne re: postponement; conference with client and Tim; telephone conference with Tintner; telephone conference with Attorney Roberto; draft letter for Attorney Spanier; research NCAA rules	300.00	3.50	1,050.00
P	07/14/2015	EAS	Letter to Schultz's attorney re: Baldwin deposition; telephone conferences with Baldwin's attorney (Tintner); review Spanier petition; research interview rules	300.00	3.50	1,050.00

Michael McQueary

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Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	07/15/2015	EAS	Draft letter to Judge Gavin re: intervention; prepare for Erickson deposition	300.00	1.70	510.00
B	07/16/2015	EAS	Prepare for and take Erickson deposition in State College (re: motion to compel); review e-mails re: copy of transcript and telephone conference with Tintner	300.00	7.00	2,100.00
C	07/20/2015	EAS	Review Judge Gavin's Court order; prepare for Baldwin deposition	300.00	2.00	600.00
D	07/21/2015	EAS	Take Baldwin deposition in Pittsburgh	300.00	10.70	3,210.00
E	07/22/2015	CER	Research re: compensation and expenses for witnesses	150.00	0.50	75.00
		EAS	E-mails re: John McQueary deposition; prepare for John McQueary deposition; e-mails re: scheduling Mike's deposition	300.00	2.50	750.00
F	07/23/2015	EAS	Represent John McQueary at deposition in PMA case in State College	300.00	9.00	2,700.00
G	07/28/2015	EAS	Review file re: unresolved discovery issues	300.00	2.00	600.00
H	07/30/2015	EAS	E-mail to Conrad re: notes for Baldwin deposition review; work on unresolved discovery issues	300.00	2.00	600.00
I	08/03/2015	EAS	Telephone conference and e-mails to Tim re: [redacted]	300.00	0.20	60.00
J	08/04/2015	EAS	Telephone conference with Tim re: [redacted] e-mails to/from Tim re [redacted]	300.00	0.30	90.00
K	08/05/2015	EAS	Telephone conferences with Prothonotary re: un-redacted Powers e-mails; e-mail to client and Tim	300.00	0.60	180.00
L	08/12/2015	EAS	Research re: punitive damages	300.00	2.00	600.00
M	08/13/2015	EAS	Telephone conference with Baldwin's attorney; draft letter to Conrad and attorney for Belcher and attorney for Garban; e-mails to client and Tim; review recent Whistleblower case (Rohrer); telephone conference with Prothonotary re: e-mails	300.00	4.00	1,200.00
N	08/24/2015	EAS	Review Discovery request	300.00	2.00	600.00
O	08/25/2015	EAS	Review discovery request; prepare for deposition	300.00	1.30	390.00
P	08/26/2015	EAS	Represent client at PMA deposition in State College	300.00	10.70	3,210.00
Q	08/27/2015	EAS	Conference with Court; telephone conference with attorney for Belcher re: Belcher's deposition and Fifth Amendment; telephone conference with John McQueary	300.00	0.60	180.00
R	08/31/2015	CER	Research spousal privilege	150.00	1.80	270.00
S	09/04/2015	CER	Research physician privilege, spousal privilege, admissibility of communication	150.00	4.10	615.00

Michael McQueary

January 19, 2017
Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	09/08/2015	EAS	Research re: discovery	300.00	3.00	900.00
		CER	Research spousal privilege, communication after divorce	150.00	1.20	180.00
B	09/09/2015	EAS	Telephone conference with Belcher's attorney; telephone conference with Garban's attorney; e-mail to Court re: Belcher and Garban depositions	300.00	0.60	180.00
C	09/10/2015	EAS	Review outstanding issues	300.00	1.70	510.00
D	09/11/2015	EAS	Extended telephone conference with Conrad re: outstanding issues; e-mail to Garban's attorney re: deposition date; conference call with Mike and Tim	300.00	2.30	690.00
E	09/14/2015	CER	Spousal privilege before marriage	150.00	1.00	150.00
F	09/16/2015	EAS	Numerous e-mail to Garban's counsel re: deposition; e-mails to Belcher's counsel; work on answers to discovery	300.00	1.50	450.00
G	09/17/2015	EAS	E-mail to Conrad re: Garban deposition; e-mail to Belcher's attorney and e-mail to Conrad re: Belcher's deposition	300.00	0.50	150.00
H	09/18/2015	EAS	Telephone conference with client re: [redacted]	300.00	0.20	60.00
I	09/21/2015	EAS	E-mails re: Belcher deposition	300.00	0.10	30.00
J	09/22/2015	EAS	E-mails to/from Levine re: Garban; review Exhibits in Belcher deposition; review Belcher preliminary hearing testimony; telephone conference with Fleming; telephone conference with John McQueary re: [redacted]	300.00	2.80	840.00
K	09/24/2015	EAS	Prepare Garban deposition notice; research internet re: Garban	300.00	2.00	600.00
L	09/25/2015	EAS	Review Fleming's 5th Amendment research; telephone conference with Fleming re: [redacted] extended telephone conference with Conrad re: outstanding issues	300.00	1.20	360.00
M	09/28/2015	EAS	Conference with client to work on discovery; work on discovery	300.00	4.20	1,260.00
N	09/29/2015	EAS	Research request for admissions; review correspondence from opposing counsel (Conrad); review Baldwin deposition; begin prepare for Garban	300.00	2.50	750.00
O	10/01/2015	EAS	Letter to Attorney Kornfeld at Kasowitz firm re: McQueary transcript; prepare for Garban deposition	300.00	2.00	600.00
P	10/05/2015	EAS	Take Steve Garban deposition in State College; letter to PMA-PSU Court Reporter	300.00	7.00	2,100.00
Q	10/06/2015	EAS	Work on discovery response	300.00	3.00	900.00
R	10/08/2015	EAS	Work on discovery response	300.00	3.50	1,050.00

Michael McQueary

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Account No: 2716-00M
Statement No: 31155

RE: Employment

				Rate	Hours	
A	10/12/2015	EAS	Work on discovery response	300.00	2.00	600.00
B	10/13/2015	EAS	Work on discovery response; telephone conference with client re: [redacted]	300.00	2.00	600.00
C	10/14/2015	EAS	Work on discovery	300.00	6.50	1,950.00
		CER	Review Answer to interrogatory 14; pull additional Wikipedia information	150.00	1.60	240.00
D	10/15/2015	EAS	Telephone conference with client; finalize discovery response	300.00	6.00	1,800.00
E	10/27/2015	EAS	Review Equitable Distribution Agreement	300.00	0.70	210.00
F	10/28/2015	EAS	E-mail to client re: [redacted]	300.00	0.10	30.00
G	10/30/2015	EAS	Research re: Fifth Amendment re: Belcher	300.00	2.00	600.00
H	11/05/2015	EAS	Telephone conference with Attorney Messineo (Ganter's attorney)	300.00	0.30	90.00
I	11/10/2015	EAS	Telephone conference with Tim re [redacted] telephone conference with Court Administrator; review Gavin letter and letter to Conrad re: deposition	300.00	1.50	450.00
J	11/12/2015	EAS	Telephone conference with Tim re: [redacted]	300.00	0.20	60.00
K	11/13/2015	EAS	Review jury questionnaire; e-mails to Tim re: [redacted]; e-mails to opposing counsel; research questionnaire	300.00	2.00	600.00
L	11/16/2015	EAS	Telephone conference with opposing counsel (Conrad); e-mails to client and Tim re: [redacted]	300.00	0.80	240.00
M	11/19/2015	EAS	Complete letter brief to Court re: motion to determine sufficiency	300.00	6.00	1,800.00
N	11/23/2015	EAS	Complete letter to Attorney Kornfield re: client's deposition; draft letter to Judge Gavin	300.00	1.00	300.00
O	11/24/2015	EAS	Telephone conference with opposing counsel (Conrad) to go over supplemental response	300.00	0.70	210.00
P	11/25/2015	EAS	Telephone conference with opposing counsel re: motion and related matters	300.00	0.50	150.00
Q	11/30/2015	EAS	E-mails re: conference with Judge Gavin; work on case/research	300.00	4.00	1,200.00
R	12/01/2015	EAS	Research; telephone conference with opposing counsel re: resolving to determine sufficiency and conference with Judge Gavin; draft compromise language re: e-mails; telephone conference with Fleming	300.00	4.00	1,200.00
S	12/02/2015	EAS	Review file; draft letter to Judge Gavin	300.00	1.50	450.00
T	12/03/2015	EAS	Work on Case Management schedule proposal	300.00	3.00	900.00

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RE: Employment

				Rate	Hours	
A	12/07/2015	EAS	Review letter from opposing counsel re: Court; e-mail to opposing counsel	300.00	0.20	60.00
B	12/08/2015	CER	Work on spousal privilege memo	150.00	0.50	75.00
		EAS	Review file re: remaining discovery issues; research doctor/patient/death issues	300.00	4.00	1,200.00
C	12/09/2015	EAS	Continue research re: doctor/patient/death issue; work on remaining discovery issues	300.00	4.00	1,200.00
D	12/10/2015	CER	Research Penn State's progress.psu.edu website for salaries of Curley and Spanier, and costs of attorney fees paid by PSU	150.00	1.00	150.00
		EAS	Research re: Curley attorney's fees/salary; work on Case Management Conference preparation	300.00	3.00	900.00
E	12/15/2015	EAS	Telephone conference with opposing counsel re: second supplemental filing; prepare for and attend conference with Judge Gavin (and Tim and Conrad) in West Chester	300.00	8.00	2,400.00
F	12/16/2015	EAS	Draft withdrawal of Motion re: sufficiency; telephone conference with client and Tim	300.00	1.50	450.00
G	12/17/2015	EAS	Search file for July/August 2012 letter re: settlement; e-mail to Attorney Conrad re: July 2012 leak	300.00	0.50	150.00
H	12/21/2015	EAS	E-mail from/to opposing counsel re: depositions and opposing counsel's "confidentiality concerns unrelated to my client"	300.00	0.20	60.00
I	12/30/2015	CER	Research physician/patient privilege, physicians not to disclose information	150.00	2.60	390.00
J	12/31/2015	CER	Research Physicians not to disclose information; prepare memo	150.00	2.60	390.00
K	01/04/2016	CER	Work on physicians privilege and disclosure information memo; research	160.00	2.50	400.00
L	01/07/2016	EAS	Update discovery	310.00	2.00	620.00
M	01/12/2016	EAS	Draft letter to Judge Gavin re: Mike's deposition/delays	310.00	1.50	465.00
N	01/19/2016	EAS	Review Judge Gavin's letter; review opposing counsel's (Conrad's) letter; telephone conference with client and Tim	310.00	2.00	620.00
O	01/20/2016	EAS	Work on updating interrogatory answers	310.00	2.00	620.00
P	01/22/2016	EAS	E-mails to client; review Curley, Schultz and Spanier Opinions	310.00	3.00	930.00
Q	01/26/2016	EAS	Telephone conference with client and Tim re: [redacted]	310.00	0.40	124.00
R	01/27/2016	EAS	E-mail to Conrad re: Mile's deposition; e-mails to Tim and Mike; telephone conference with Mahon's attorney (Janove)	310.00	1.00	310.00

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RE: Employment

				Rate	Hours	
A	01/28/2016	EAS	Review e-mails from client; e-mails to client; e-mail to Conrad	310.00	0.70	217.0
B	01/29/2016	CER	Research re: physician privilege	160.00	0.80	128.0
C	02/01/2016	CER	Draft physician privilege memo	160.00	1.60	256.0
D	02/02/2016	CER	Research and draft patient-physician privilege memo to EAS	160.00	4.10	656.0
E	02/03/2016	EAS	Letters to lawyers for Spanier, Curley, Schultz and Mahon re: depositions; letter to Conrad	310.00	1.00	310.0
F	02/05/2016	CER	Revise physician privilege memorandum	160.00	1.60	256.0
G	02/08/2016	EAS	Review supplemental discovery request; check last updates; telephone conference with client; telephone conference with Schultz's attorney; forward letter of deposition dates to opposing counsel (Conrad)	310.00	1.00	310.0
H	02/09/2016	EAS	Telephone conference with Nancy Conrad re: depositions, settlement, etc.; telephone conference with Caroline Roberto re: Curley deposition	310.00	0.60	186.0
I	02/10/2016	EAS	E-mails to Schultz Attorney; e-mail to client and Tim re: [redacted]	310.00	0.60	186.0
J	02/11/2016	EAS	E-mails to client; e-mail to Conrad re: Curley deposition - look at resumes, etc.	310.00	0.70	217.0
K	02/12/2016	EAS	E-mails to Conrad; conference call with Tim and Mike re: [redacted]	310.00	0.80	248.0
L	02/22/2016	EAS	Assemble document request update; e-mails to Tim and Conrad re: [redacted]	310.00	3.50	1,085.0
M	02/23/2016	EAS	Work on discovery; expert research	310.00	2.30	713.0
N	02/24/2016	EAS	Deposition and case prep	310.00	2.50	775.0
O	02/25/2016	EAS	E-mails re: deposition and expert research	310.00	1.80	558.0
P	02/26/2016	EAS	Prepare for deposition; research athletic director	310.00	5.00	1,550.00
Q	02/29/2016	EAS	Represent client at deposition	310.00	9.00	2,790.00
		CER	Research for deposition	160.00	0.80	128.00
R	03/01/2016	EAS	Second day of deposition	310.00	7.00	2,170.00
S	03/02/2016	EAS	Telephone conference with Shaw Taylor; draft settlement offer	310.00	3.50	1,085.00
T	03/03/2016	EAS	Draft statement to accompany settlement offer; e-mail to Conrad; e-mail Judge Gavin; telephone conference with client	310.00	2.00	620.00
U	03/06/2016	EAS	Schultz deposition prep (including review Grand Jury testimony and discovery)	310.00	2.00	620.00

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RE: Employment

				Rate	Hours	
A	03/07/2016	EAS	Telephone conference with Spanier attorney (Ainslie); telephone conference with opposing counsel (Conrad); e-mails to opposing counsel; telephone conference with Tim; e-mail to client; e-mail to opposing counsel re: Spanier deposition; brief telephone conference with AD Parry	310.00	1.50	465.00
B	03/08/2016	EAS	Prepare for Schultz deposition	310.00	2.50	775.00
		JAN	Research defamation	250.00	1.70	425.00
C	03/09/2016	EAS	Schultz deposition in State College	310.00	7.00	2,170.00
D	03/10/2016	EAS	Brief telephone conference with John Parry	310.00	0.20	62.00
E	03/14/2016	EAS	Begin review discovery requests	310.00	1.70	527.00
F	03/15/2016	EAS	E-mail to Parry re: [redacted] complete review discovery request; telephone conference with Tim and Mike re: [redacted]	310.00	2.20	682.00
G	03/16/2016	CER	pull Spanier v. Penn State; research Graham Spanier articles and journal	160.00	3.20	512.00
		EAS	Draft letter to client re: [redacted] begin review of Spanier Complaint v. Freeh; telephone conference with Mike and Tim	310.00	3.50	1,085.00
H	03/17/2016	CER	Dr. Dranov's testimony from Sandusky hearing	160.00	2.60	416.00
		EAS	E-mail to opposing counsel; letter to client re: [redacted] e-mails to Parry; complete review of Spanier v. PSU Complaint; read Dranov's testimony	310.00	4.00	1,240.00
I	03/21/2016	CER	Obtain Spanier's grand jury testimony	160.00	1.20	192.00
		EAS	Review requests for subpoenas; review Scranton case and defamation research	310.00	2.40	744.00
J	03/22/2016	EAS	Prepare for meeting with AD Parry	310.00	2.00	620.00
		EAS	Travel to Cleveland to meet with AD Parry	310.00	5.80	1,798.00
		CER	Joan Cable testimony	160.00	1.10	176.00
K	03/23/2016	EAS	Meeting with AD Parry in Cleveland	310.00	1.50	465.00
		EAS	Travel from Cleveland to Harrisburg	310.00	6.00	1,860.00
L	03/24/2016	EAS	Prepare for Spanier deposition; telephone conference with Mike and Tim re: [redacted]	310.00	3.00	930.00
M	03/27/2016	EAS	Prepare for Spanier deposition	310.00	2.00	620.00
N	03/28/2016	EAS	Prepare for and take Spanier deposition in State College	310.00	9.00	2,790.00
O	03/29/2016	EAS	Conference call with client and Tim re: [redacted]	310.00	0.80	248.00
P	03/30/2016	EAS	Extended telephone conference with Parry	310.00	0.70	217.00
Q	03/31/2016	EAS	Prepare for Curly deposition; telephone conference with Tim			

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RE: Employment

				Rate	Hours	
			re [redacted]	310.00	2.00	620.00
A	04/01/2016	EAS	Prepare for Curly deposition; take Curly deposition in State College	310.00	7.00	2,170.00
B	04/04/2016	EAS	Work on objection to subpoena; telephone conferences with Tim re: [redacted] review Parry engagement letter	310.00	4.00	1,240.00
C	04/05/2016	EAS	Review e-mail from Attorney Jeff McCarron re: Courtney deposition; letter to Attorney McCarron; finalize Parry letter	310.00	0.40	124.00
D	04/06/2016	EAS	Telephone conference with [redacted] and Tim Fleming	310.00	0.30	93.00
E	04/07/2016	EAS	Review Parry Agreement	310.00	0.20	62.00
F	04/08/2016	EAS	E-mail to client; telephone conference with Jeff McCarron; e-mails to opposing counsel's office re: telephone conference with Judge Gavin re: documents subpoenas	310.00	0.50	155.00
G	04/11/2016	CER	Discovery research; Interrogatory research	160.00	1.10	176.00
		EAS	Review Request for Admissions and interrogatories history; begin work on answers	310.00	3.00	930.00
H	04/12/2016	EAS	Work on Answers	310.00	3.00	930.00
I	04/13/2016	EAS	Telephone conference with Tim Fleming and [redacted] review research re: p.r./attorney privilege; Request for Admissions	310.00	1.50	465.00
J	04/14/2016	CER	Discovery research; interrogatory research	160.00	0.60	96.00
		EAS	Prepare for telephone conference with Judge Gavin; telephone conference with client and Tim; work on Response to Request for Admissions	310.00	3.20	992.00
K	04/15/2016	EAS	Work on request for Admissions; transmit [redacted] to client; conference with with Judge Gavin et al re: objections to subpoenas	310.00	1.70	527.00
L	04/18/2016	EAS	Draft letter to Conrad re: clarification of unspecified terms in her counter offer; work on production of documents and interrogatories	310.00	3.30	1,023.00
M	04/19/2016	EAS	Draft Mahan deposition notice; review Intent to Subpoena Savannah State documents; work on document request	310.00	3.00	930.00
N	04/20/2016	EAS	Work on Answer to third set of interrogatories and request for production of documents	310.00	2.00	620.00
O	04/21/2016	EAS	Work on answer to third set of interrogatories and production of documents; telephone conference with client	310.00	4.30	1,333.00
P	04/22/2016	EAS	Telephone conference with John Parry	310.00	1.00	310.00
Q	04/25/2016	EAS	Assemble documents to sent to Parry; work on document production request	310.00	3.40	1,054.00

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RE: Employment

				Rate	Hours	
A	04/26/2016	EAS	Work on discovery response	310.00	4.50	1,395.00
		CER	Damages online research; connecting client to 11/5/11 Statement	160.00	5.10	816.00
B	04/27/2016	EAS	Work on response to document request	310.00	5.00	1,550.00
		CER	Damages online research; response to interrogatories/document request using Bing search engine	160.00	5.40	864.00
C	04/28/2016	EAS	Telephone conference with forensic accountant re: salary calculations; complete Response to documents; Jensen deposition notice; telephone conference with client	310.00	2.70	837.00
D	05/02/2016	EAS	TASA request for experts; extended conference with Freeman Attorney Stavros; review TASA responses; telephone conference with Parry; telephone conference with Tim Fleming; telephone conference with client	310.00	3.90	1,209.00
E	05/03/2016	EAS	Continue work on getting wage expert; prepare for Mahon and Jensen depositions	310.00	3.00	930.00
F	05/04/2016	EAS	Travel to/from and take Mahon and Jensen depositions in State College	310.00	8.00	2,480.00
G	05/05/2016	EAS	Review letter from Judge Gavin; conference with client and Tim; conference with Cate re: google metrics; review transcripts	310.00	3.00	930.00
H	05/09/2016	EAS	Continue work on experts; assemble documentation for experts; continue transcript review	310.00	3.20	992.00
I	05/10/2016	CER	Research re: Google analysis	160.00	1.20	192.00
J	05/11/2016	EAS	Draft letter to opposing counsel re: outstanding issues; transcript p.o.f. review	310.00	5.00	1,550.00
K	05/12/2016	EAS	Letter to Judge Gavin; extended telephone conference with Parry	310.00	3.00	930.00
L	05/16/2016	EAS	Telephone conference with Tim re: [redacted]; e-mail to Stavros	310.00	0.70	217.00
M	05/17/2016	EAS	Telephone conference with Stavros; conference call with client and Tim; review letter from Conrad; e-mail to Conrad; telephone conference with Conrad re: her motion to Schultz, Curly and Spanier; telephone conference with client	310.00	2.00	620.00
N	05/18/2016	EAS	Telephone conference with client; research re: internet activity; telephone message to Stavros	310.00	2.50	775.00
		CER	Research online for "McQueary" and "blame"	160.00	4.60	736.00
O	05/19/2016	EAS	Telephone conference with Stavros; e-mails Stavros; revise letter agreement; e-mail to client; telephone conference with Parry; assemble documents for Stavros	310.00	3.50	1,085.00

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