ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE
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:
Definitive Motion for Post-Trial Relief

Filed on Behalf of:
Defendant, The Pennsylvania State University

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Defendant, The Pennsylvania State University, moves for post-trial relief.

The first part of this motion states the University's grounds for post-trial relief regarding the Court's November 30, 2016 verdict on the Whistleblower Claim and March 30, 2017 award of attorney's fees, costs, and additional damages.

The second part of this motion restates the University's preliminary motion for post-trial relief filed on November 7, 2016, regarding the jury verdict on the claims of defamation and misrepresentation.

The University's motion on all aspects of the case, including the portion decided by the jury, did not become due until after the Court issued a verdict on the Whistleblower Law claim. *See Stevenson v. General Motors Corp.*, 521 A.2d 413, 416-17 (Pa. 1987); *see also Slusser v. Laputka, Bayless, Ecker & Cohn, P.C.*, 9 A.3d 1200, 1206 (Pa. Super. 2010). Therefore, the University's motion for post-trial relief regarding the jury verdict, filed on November 7, 2016, was not actually due on that date. The University filed it then out of caution because the Court's verdict on the Whistleblower Law claim was still pending. The Court's November 30, 2016 order on the Whistleblower Law claim provided that its "effective date . . . for purposes of filing any post-trial motions, SHALL BE the date the award of counsel fees, etc. is filed of record." (11/30/16 Order at 2). Therefore, the University's definitive post-trial motion on all issues became due only after the Court issued its order on attorney's fees and costs.

The University restates its preliminary November 7, 2016 motion beginning at paragraph 43 below in order to ensure that the issues the University presents are preserved. Paragraphs 43 through 192 of this motion are identical to paragraphs 7 through 155 of the University's November 7, 2016 preliminary motion.

MOTION FOR POST-TRIAL RELIEF ON NON-JURY VERDICT AND AWARD OF ATTORNEY'S FEES, COSTS, AND ADDITIONAL DAMAGES

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON MCQUEARY'S WHISTLEBLOWER CLAIM

A. McQueary failed to establish a causal connection between any report of wrongdoing and his separation from the University.

1. 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.[1]

2. McQueary was required to prove with concrete facts or surrounding circumstances that his dismissal or other adverse action was caused by his alleged reports of wrongdoing. *See Golaschevsky v. Dep't of Envtl. Prot.*, 720 A.2d 757, 759 (Pa. 1998).

3. McQueary failed to introduce sufficient evidence to show that his dismissal or other adverse action was caused by any report he made of wrongdoing or waste.

4. Over ten years passed from when McQueary reported Sandusky's conduct to Paterno, Curley, and Schultz to when he was placed on administrative

[1] The University properly preserved this ground. *See* Answer ¶¶ 35-48, 65-72, 77-78, 80; University's Proposed Findings of Fact and Conclusions of Law (Submitted November 8, 2016).

leave and his contract was eventually not renewed. There is no evidence that he was subjected to any animus or retaliation during that period. (*See* 11/30/16 Op. at 52). That is fatal to his attempt to establish causation based on any 2001 report of wrongdoing. *See Golaschevsky*, 720 A.2d at 760-62; *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503-04 (3d Cir. 1997); *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).

5. To the extent that the Court found that McQueary was dismissed or suffered adverse 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.

6. The court improperly considered whether Curley, Schultz, and Spanier acted inappropriately in considering the Whistleblower Claim. McQueary never testified or alleged that he reported wrongdoing by Schultz, Spanier, or Curley to other administrators at the University, law enforcement, or the Attorney General's office.

7. To the extent that the Court found that McQueary made a report of wrongdoing because Curley, Schultz, or Spanier were mandated reporters, the court erred for the reasons described in the University's preliminary post-trial

motion, restated below at paragraphs 89-108. In particular, there was no evidence establishing that Curley, Schultz, or Spanier fall within any of the categories of mandated reporters under 23 Pa.C.S. § 6311 (2001).

B. McQueary was dismissed for separate and legitimate reasons that were not pretextual.

8. The University is entitled to judgment notwithstanding the verdict on the Whistleblower Law claim because any adverse action against McQueary was because of separate and legitimate reasons that were not pretextual.[2]

9. 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).

10. The Court erred in concluding that the University failed to establish that it had a separate, legitimate, non-pretextual reason for McQueary's separation. McQueary's contract was not renewed because the new head football coach did not offer him a position on his staff. Further, to the extent McQueary was relieved of his coaching duties before the change in head coaches, the evidence establishes that was a result of safety concerns for McQueary and others.

[2] The University properly preserved this issue. *See* Answer ¶¶ 35-48, 65-72, 77-78, 80; University's Proposed Findings of Fact and Conclusions of Law (Filed November 7, 2016).

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.

11. 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.[3] 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.[4]

12. A plaintiff may not recover duplicative damages for the same injury.

13. 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). The Court also awarded non-economic damages for damage to reputation and humiliation. (11/30/16 Op. at 58-62).

14. The jury was permitted to award damages on the defamation and misrepresentation claims for actual harm to McQueary's reputation, emotional

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[3] The University properly preserved this ground. *See* Proposed Findings of Fact and Conclusions of Law (Filed November 7, 2016) ¶¶ 77-78.

[4] The University properly preserved this ground through its request at trial to submit proposed special interrogatories. N.T. (10/26/2016 (P.M.)) at 62:12-17-63:4.

distress, mental anguish and humiliation, and "any other special injuries." (11/30/16 Op. at 58). These are duplicative of damages that were awarded for the Whistleblower Law claim.

15. 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 statement that "Penn State could have avoided this issue by use of a simple jury interrogatory," *id.* at 58-59, the University did not waive this issue by not requesting special interrogatories. To the contrary, the University proposed that it 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 refused the University's request to submit special interrogatories and instructed it to submit a verdict slip without special interrogatories. N.T. (10/26/2016 (P.M.)) at 62:15-63:4.

16. 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 damages award should be vacated to the extent it awards McQueary non-economic damages on his Whistleblower Law claim.

17. 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.[5]

18. The Court awarded McQueary an additional $1 million damages to compensate him for non-economic loss including humiliation and damage to his reputation. (11/30/16 Op. at 58-62).

19. In addition to being duplicative of damages that the jury awarded McQueary on his defamation and misrepresentation claims, this award of non-economic damages should be vacated because non-economic damages are not recoverable under the Whistleblower Law.

20. 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. McQueary did not produce competent evidence of any mental emotional

[5] The University properly preserved this ground. *See* Proposed Findings of Fact and Conclusions of Law (Filed November 7, 2016) ¶¶ 81-83.

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.

II. MOTION FOR A NEW TRIAL

21. In the alternative to judgment in its favor on the Whistleblower Law claim or reducing damages on that claim to nominal damages, the University moves for a new trial on the Whistleblower Law claim for the following reasons.

A. The Court erred in refusing the University's requests for a stay pending the outcome of the criminal litigation against Curley, Schultz, and Spanier.

22. 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.[6]

23. 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 exercised their Fifth Amendment rights against testifying in this case.

[6] The University properly preserved this ground through its motions to stay filed October 22, 2012 and May 31, 2016 and their respective memoranda of law.

24. The trial court erred in denying the stay for the reasons explained in the University's preliminary post-trial motion, restated below at paragraphs 43-62.

25. The testimony of Curley and Schultz was relevant to the University's defense of the Whistleblower Claim, because the Whistleblower Claim raised factual questions relating to the February 2001 incident and subsequent communications between McQueary, Curley, and Schultz.

26. 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 introduce relevant testimony from Curley and Schultz.

27. Further, as described below at paragraphs 79-88, 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 Claim. The University is entitled to a new trial, or, alternatively, reconsideration by the Court of its findings of fact and conclusions of law on the Whistleblower Law claim without the effect of any adverse inference.[7]

[7] The University properly preserved this ground through objections at trial and bench brief. *See* N.T. (10/27/2016) at 126-128; Memorandum (8/26/2016) (Ex. W to the Post-Trial Brief).

28. 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.

B. The Court erred in drawing an adverse inference against the University based on its assertion of the attorney-client privilege.

29. 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 because it invoked its attorney-client privilege.[8]

30. The Court stated that it would make an adverse inference against the University when the University objected on the basis of privilege to questions asked of certain witnesses at trial. (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.

31. 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).

[8] The University properly preserved this ground by objections at trial. 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.

32. 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.

C. The Court erred by refusing to permit the University to offer media accounts that cast McQueary in a negative light.

33. As described below at paragraphs 170-78, 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 actions in response to the Sandusky incident.

34. The excluded evidence would have shown that any reputational harm suffered by McQueary was due to his own actions. The court awarded damages for McQueary's reputational damage in connection with McQueary's Whistleblower Claim. (11/30/16 Op. at 60).

35. The Court's error prevented the University from introducing evidence relevant to these claimed damages, and the University is entitled to a new trial.[9]

[9] The University properly preserved this ground by proffers and objections at trial. N.T. (10/18/2016 A.M.) at 53:14-63:25; 80:8-86:22.

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

A. The trial court erred in awarding attorney fees based on McQueary's counsel's contingency fee agreement rather than the lodestar.

36. 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.[10]

37. Attorney's fees under fee-shifting statutes, including the Whistleblower Law, should be based on a lodestar of counsel's reasonable fees, which is based on multiplying the number of hours reasonably spent on the litigation by a reasonable rate. *See Krebs v. United Ref. Co.*, 893 A.2d 776, 790-91 (Pa. Super. 2006); *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 52-53 (Pa. 2011).

38. The Court erred by basing its fee award on the contingency fee agreement between McQueary and his lawyers instead of the lodestar. The Court's award of attorney fees totaled $1,663,016.00.

39. The Whistleblower Law includes "reasonable" attorney fees among "costs" and does not authorize any fee award exceeding those "costs." *See* 43 P.S.

[10] The University properly preserved this ground through objections to McQueary's fee petition, filed on January 11, 2017 and February 8, 2017 and by argument at the hearing on the fee petition.

§ 1425. Basing a fee award on a contingency fee agreement and not the actual hours worked violates Section 1425.

40. To the extent that a contingency fee agreement is relevant in determining a reasonable fee award, it is only one factor in evaluating whether the lodestar is reasonable. It is not a substitute for conducting a lodestar analysis. *See Krebs*, 893 A.2d at 790.

41. The time entries that McQueary's lawyers submitted include work performed in connection with McQueary's defamation and misrepresentation claims; 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 charges are recoverable, because the only one of McQueary's claims that includes a fee-shifting provision is his claim under the Whistleblower Law.

42. McQueary has substantiated only $202,619.50 in reasonable attorney's fees that are attributable to his Whistleblower Claim. *See* Defendant's Continuing Objections, and Response, to Plaintiff's Contemporaneous Time Sheets Untimely Submitted In Support of His Petition for Litigation Costs, Filed February 8, 2017. The March 30, 2017 order should be vacated to the extent it awards more than that 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.

RESTATED GROUNDS FROM PRELIMINARY MOTION FOR POST-TRIAL RELIEF

The University restates its November 7, 2016 preliminary Motion for Post-Trial Relief out of caution to ensure that the issues it raised are preserved. The following paragraphs are identical to paragraphs 7 through 155 in the University's November 7, 2016 motion.

IV. MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR A NEW TRIAL.

A. The Court's Failure to Grant the University's Requests for a Stay Pending the Outcome of The Criminal Litigation against Tim Curley and Gary Schultz Constitutes Reversible Error.

43. On October 22, 2012, the University filed a Motion to Stay Proceedings with the Court, arguing, among other things, that it would suffer severe prejudice if forced to move forward in litigation and discovery on the misrepresentation and other claims at a time when Curley and Schultz were awaiting their criminal trials. See generally, Motion to Stay Proceedings, dated October 22, 2012.

44. On November 16, 2012, and in accordance with the Court's Scheduling Order, the University filed a Memorandum of Law In Support of Its Motion to Stay Proceedings, which, among other things, addressed the following specific issues: (1) the issues in this case and the related criminal proceedings overlap substantially; (2) the stage of the related criminal proceedings favor a stay; (3) McQueary will not be harmed by a stay of this case; (4) the burden on the

University if this case is not stayed would be substantial; (5) the interests of the Court favor staying this case; (6) the public's interest favors a stay; and, (7) the interests of non-parties favor a stay. See Memorandum of Law, dated November 16, 2012.

45. On December 19, 2012, the Court denied the University's Motion to Stay Proceedings. See Order, dated December 19, 2012. At the time, the Court did not address the University's request in the context of the misrepresentation claim, despite being raised by the University's Motion, and further concluded that Curley and Schultz "are not at risk of incriminating themselves." Despite these individuals properly invoking their Fifth Amendment rights at this time, the Court forced the University to proceed without consideration of the implications on its ability to defend against the claims and, in particular, the University's ability to defend against the misrepresentation claim. See generally, id.

46. On January 13, 2016, the Court notified the parties that trial would be scheduled for October 17, 2016.

47. On March 9, 2016, Schultz appeared for his deposition in this matter and asserted his Fifth Amendment rights to all substantive questions related to Plaintiff's claims and the University's defenses including, but not limited to the verbal communication between him and Plaintiff which form the sole basis of the misrepresentation claim. On April 1, 2016, Curley at his deposition likewise

asserted his Fifth Amendment rights to all substantive questions related to Plaintiff's claims and the University's defenses including, but not limited to the verbal communication between him and Plaintiff which form the sole basis of the misrepresentation claim.

48. On May 31, 2016, the University filed a Second Motion to Stay Proceedings, wherein the University outlined the areas Curley and Schultz asserted their Fifth Amendment Rights and again fully addressed how all factors continued to weigh heavily in favor of a stay. See Second Motion to Stay Proceedings, dated May 31, 2016.

49. On June 30, 2016, and in accordance with the Court's Scheduling Order, the University filed a Memorandum of Law In Support of Its Second Motion to Stay Proceedings, which, among other things, addressed recent developments with respect to non-party witnesses asserting their Fifth Amendment Rights and the implication of the same specific issues detailed in paragraph 8 above. See Memorandum of Law, dated June 30, 2016.

50. Within its Second Motion to Stay Proceedings, the University argued that "Plaintiff'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 [verbal] communications between them and Plaintiff regarding the report of misconduct. Without the testimony from Schultz and Curley, the

University is unable to adequately develop its defenses in this case . . . ." Id., at 21. Simply stated, the testimony from these witnesses was deemed critical because no written records existed as to their alleged verbal representations to Plaintiff – the very same verbal representations that formed the sole basis of the misrepresentation claim.

51. On August 11, 2016, the Court denied the University's Second Motion to Stay. See Opinion and Order, dated August 11, 2016. With respect to the misrepresentation claim, the Court held:

> Penn State as the possessor of its own records has had adequate time to search them to determine what, if any action, they took in order to refute Plaintiff's claim. ***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 Id., at 5.[11] The Court further provided that "I have ruled that Messrs. Curley and Schultz have properly invoked their right not to testify in this matter." See id., at 8.[12]

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[11] During trial, the Court denied the University's request for special interrogatories to be presented to the Jury and the Court instead ruled that only a basic questionnaire would be presented to the Jury. N.T. (10/26/2016 P.M.) at 62-63.

[12] In December 2012, the Court held that self-incrimination issues were not presented in this case. See supra, at 3.

52. At the trial of this action, Curley and Schultz continued to assert their Fifth Amendment Rights by means of a stipulation as to all substantive matters and the University continued to suffer severe prejudice. The Court further instructed the jury that it may take an adverse inference against the University and denied the University's request for Special Jury Interrogatories, as referenced by the Court in its prior August 2016 Opinion and Order. See Stipulation, at Court Trial Exhibit No. 2; N.T. (10/26/2016 P.M.) at 62-63.

53. As presented to the Court, the denial of the University's requests to stay proceedings constitutes reversible error under the circumstances presented in this case. See Branham v. Rohm & Haas Co., 19 A.3d 1094, 1109 (Pa. Super. Ct. 2011) (quoting Whitaker v. Frankford Hosp., 984 A.2d 512, 522 (Pa. Super. Ct. 2009) (explaining that reversible error exists as to a discretionary ruling where the trial court abused its discretion or committed legal error, and the appellant is prejudiced by abuse or legal error); and In re Adelphia Communications Securities Litigation, No. 02-1781, 2003 U.S. Dist. LEXIS 9736, at *6 (E.D. Pa. May 13, 2003) (citing Landis v. North American Co., 299 U.S. 248, 254-56 (1936)).

54. When deciding whether to stay a civil case pending the resolution of a related criminal case, a court can consider the following factors: "(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." 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)).

55. An additional factor to be considered is the interests of persons not parties to the civil litigation. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (listing factors similar to those in Adelphia Communications in addition to the interests of these non-parties).

56. With respect to the first factor, there are substantial overlapping factual issues that are integral to both this civil litigation and the related criminal proceedings of Schultz and Curley; Schultz and Curley invoked their Fifth Amendment privilege with respect to the following subject matters of this case: (1) all facts and circumstances regarding their knowledge and involvement in a 1998 incident involving Gerald Sandusky and a child; (2) all facts and circumstances regarding their 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between them and Plaintiff regarding the aforementioned report; (4)

information related to their employment histories and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between them and non-parties regarding the allegations of the Complaint. As demonstrated at the trial of this action, and as previously recognized by the court, the facts and circumstances presented in this case are intrinsically intertwined with the key factual issues of the underlying criminal matters.

57. With respect to the second factor, the University has suffered substantial prejudice at the trial of this matter. Plaintiff's whistleblower, defamation and intentional misrepresentation claims raise factual issues that relate to information Plaintiff allegedly communicated to Schultz and Curley and the alleged responses of Schultz and Curley regarding the report of the alleged misconduct. In particular, Plaintiff'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 Plaintiff regarding the report of misconduct. Without the testimony from Schultz or Curley at trial, the Court denied the University the opportunity to present its defenses, including developing a record to test the veracity of Plaintiff's trial testimony. The Court permitted Plaintiff to testify about alleged communications with and to argue the intent of Schultz and Curley, while the University was at an absolute disadvantage

of being unable to illicit testimony from any of the only other witnesses on the same factual matters.

58. The Court further erred when it instructed the jury that it may take an adverse inference against the University and declined to "use jury questions on the verdict slip," as referenced in its August 11, 2016 Opinion and Order.

59. With respect to the third factor, the status of the related criminal proceedings against Curley and Schultz weighed in favor of staying this matter prior to the commencement of trial. Adelphia Communications, 2003 WL 22358819, at *3. In the present case, the indictments handed down against Curley and Schultz were intrinsically intertwined with the same critical facts and circumstances that underlie the claims asserted by Plaintiff in this case. See id. The court in the criminal case issued a Scheduling Order dated May 25, 2016 directing Messrs. Schultz and Curley to file all pretrial motions and supporting briefs by July 1, 2016 and the Commonwealth to file its responses by July 31, 2016. On October 13, 2016, the criminal court held argument on the various pre-trial filings. In short, the criminal proceedings are moving forward, see http://www.dauphincounty.org/government/court-departments/curley-schultz-spanier/pages/default.aspx (last visited November 4, 2016), and a stay of this matter was warranted, especially in light of the extreme prejudice suffered by the University due to the unavailability of Curley and Schultz. Under these

circumstances, the Court committed reversible error in denying the University's multiple requests to stay the proceeding.

60. With respect to the fourth factor, Plaintiff would not have been harmed by a stay of this case. When considering the prejudice to the plaintiff caused by a stay, 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. The record in this case is wholly devoid of any evidence that Plaintiff would have suffered a "unique injury" by a stay of this matter. The Court erred in denying the requests to stay proceedings on this basis.

61. Finally, the remaining factors weighed in favor of a stay so as to avoid piecemeal litigation, the unimpeded resolution of the related criminal proceedings, and the avoidance of self-incrimination issues during trial. The Court erred in denying the request to stay under these alternative factors.

62. Under these circumstances, the Court erred in denying the University's request to stay this matter and, as a result, the University suffered substantial prejudice during the trial of this matter.

B. The Court Erred In Denying the University's Motion for Compulsory Non-Suit on Plaintiff's Misrepresentation Claim.

63. During the trial of this matter, and on October 25, 2016, the University moved for compulsory non-suit on Plaintiff's misrepresentation claim. See Memorandum In Support of Motion for Compulsory Non-Suit, dated October 25, 2016. See also N.T. (10/25/2016).

64. The Court denied the University's request. See id.

65. In order to establish entitlement to relief on a claim of intentional misrepresentation, Plaintiff had the burden to establish: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or reckless as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and, (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994), in turn citing, Restatement (Second) of Torts § 525 (1977)).

66. Plaintiff had the burden of proving each of the above elements by clear and convincing evidence. Cresswell v. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 179 (Pa. Super. Ct. 2003).

67. Plaintiff claims that Curley and Schultz intentionally misrepresented to him that they would see that the University appropriately responded to this

matter and took appropriate action so as to induce Plaintiff not to report the matter to law enforcement. See Complaint, Par. 61.

68. Plaintiff did not offer evidence to establish a misrepresentation that proximately caused him harm.

69. Plaintiff testified that Curley and Schultz made the statements upon which his misrepresentation claim is based during a February 22 or 23, 2001 meeting at the Bryce Jordan Center. (See N.T. (10/21/2016A.M.) at 45; 51; and 54).

70. Plaintiff further testified that "possibly ten days, roughly a week" after the February 22 or 23, 2001 meeting in which the alleged misrepresentations were made, he received a telephone call from Curley. N.T, (10/25/2016 A.M.) at 55. During that call, Plaintiff testified that Curley told Plaintiff: *"[W]e 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."* Id. (emphasis added).

71. Based on Plaintiff's own testimony, there can be no finding of a misrepresentation with respect to the actions that Curley and Schultz represented would be taken during the February 22 or 23, 2001 meeting. Indeed, following this meeting, Plaintiff admits that Curley told him what actions were actually taken, which did not include reporting the matter to law enforcement. N.T. (10/25/2016 A.M.) at 55. Further, Plaintiff provided no evidence that he was considering or

planning to speak with law enforcement or a child welfare agency when he talked to Curley and Schultz. Plaintiff cannot now viably claim that Curley or Schultz intentionally made any misrepresentations to induce him not to report the matter to law enforcement or child welfare agencies.

72. No evidence suggests that Plaintiff's course of conduct changed because of the representations of Schultz and Curley. Plaintiff testified that he decided to report it only to head coach, Joe Paterno. N.T. (10/21/16) (A.M.)) at p. 50. This is consistent with his actions here. As such, Plaintiff failed to show that he detrimentally relied on any statements made to him in 2001 so as to detrimentally change his position at this time.

73. Plaintiff also provided no testimony or evidence that he raised any objection to Curley or Schultz to the stated course of action at that time, or at any time prior to the initiation of this lawsuit. *Indeed, Plaintiff testified at trial that he "could not believe it" when he learned that Curley was "in trouble" and was to be charged.* Id. at 68.

74. Plaintiff's disbelief demonstrates his acceptance that the steps Curley related to Plaintiff by telephone ten years earlier were proper and appropriate. Id.

75. Plaintiff cannot establish that any alleged misrepresentation by Curley or Schultz proximately caused him harm. Proximate cause does not exist where the causal chain of events resulting in the plaintiff's injury is so remote as to

appear highly extraordinary that the conduct could have brought about the harm. Commerce Bank v. First Union Nat'l Bank, 911 A.2d 133, 141 (Pa. Super. 2006).

76. Here, Plaintiff alleges that a statement that was made to him in 2001, upon which he relied at the time, in some way caused him harm in 2011. The timing alone creates a remoteness in the causal chain of events. Moreover, in February 22 or 23, 2001, Schultz and Curley told Plaintiff what actions they were taking. Accordingly, any alleged misrepresentation would have arisen on or about February 22 or 23, 2001. To file a claim in 2012 alleging a misrepresentation is time-barred. 42 Pa.C.S.A. § 5524(7) (setting two-year statute of limitations).

77. There is simply no record evidence or case law to support a finding that Curley's or Schultz's 2001 representations to Plaintiff proximately caused any injury to Plaintiff beginning over a decade later in 2011.

78. Under these circumstances, Plaintiff's misrepresentation claim fails as a matter of law and the University is entitled to a judgment in its favor notwithstanding the verdict.

C. The Court's Jury Instruction that the Jury May Make an Adverse Inference against the University Constitutes Reversible Error.

79. During the trial of this matter, the University objected to the Court instructing the jury that they may make an adverse inference against it based upon the assertion of the Fifth Amendment by non-party witnesses, Curley and Schultz.

See Memorandum Concerning Proposed Adverse-Inference Jury Charge, dated August 26, 2016.

80. Over the University's objections, the Court proceeded to instruct the jury that they may take an adverse inference against the University based upon Curley's and Shultz's invocation of their Constitutional right not to testify in this matter. N.T. (10/27/2016) at 127.

81. In Pennsylvania, "a *party's* failure to testify at a civil trial *may* raise an inference that the party's testimony would have been unfavorable to him." See Fitzpatrick v. Philadelphia Newspapers, Inc., 567 A.2d 684, 687-88 (Pa. Super. 1989) (emphasis added); see also Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (finding "the Fifth Amendment does not forbid adverse inferences *against parties* . . . when they refuse to testify in response to probative evidence offered against them.") (emphasis added); Pennsylvania Suggested Standard Civil Jury Instruction 5.51 at Subcommittee Note (stating "*[y]ou may, but you need not,* conclude that the answers would have been adverse to [name of party]'s interests.") (emphasis added).

82. However, neither the Pennsylvania Supreme Court nor the United States Supreme Court has found a permissive adverse inference is warranted where a *non-party* asserts the Fifth Amendment.

83. An exhaustive review of Pennsylvania case law suggests that if this question were posed to the Pennsylvania Supreme Court, it would find that an adverse inference is not permitted based on the assertion of the Fifth Amendment by a non-party. See Fitzpatrick, 567 A.2d 684 at 687-88 (indicating application of the adverse inference rule is "bar[red]" where a non-party invokes the Fifth Amendment); Bulman v. Myers, 467 A.2d 1353, 1355 (Pa. Super. 1983); Pratt v. Stein, 444 A.2d at 705 n. 51 (Pa. Super. 1982).

84. In the few cases addressing this issue, the central inquiry by the Pennsylvania lower courts is the lack of control over the non-party asserting the Fifth Amendment. See Pratt, 444 A.2d at n. 51 (distinguishing between party-defendants and non-parties and noting that an adverse inference "does not arise when the witness who does not testify is equally available to either party."); Bulman, 467 A.2d at 1355 (affirming refusal of adverse inference and finding permissible *"only where* the uncalled witness is peculiarly within the reach and knowledge of only one of the parties.") (citing 2 Wigmore, Evidence § 288 (3d ed. 1940)); RAD Services, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271 (3d Cir. 1986) (applying permissive adverse inference when non-party invoked Fifth Amendment, but only where it was unclear based on the record whether non-party remained an employee of defendant).

85. In the present case, Curley and Schultz are not named defendants and were not employees of the University during this litigation; the University exerted no control over Curley and Schultz and could not compel them to testify.[13]

86. Furthermore, nothing suggests that the University has in any way encouraged Curley and Schultz to invoke the Fifth Amendment in this matter; to the contrary, the University remains confident that Curley and Schultz's unfettered testimony would have supported its defenses, hence the University's pursuit of a stay pending the outcome of the criminal litigation.

87. Finally, even where a permissive adverse inference may be warranted, it begets further instructions to the jury that the University is entitled to rebut any negative inference presented by the silence of Curley and Schultz by producing contrary testimonial or documentary evidence. See RAD Services, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271 (3d Cir. 1986).

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[13]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 . . . include[ing] decisions on . . . whether to testify . . . ."); P.R.P.R. 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.").

88. Under these circumstances, the Court's Jury Instructions constitute reversible error and a new trial is warranted.

D. The Court's Jury Instruction that Spanier, Schultz, and/or Curley were Mandated Reporters as a Matter of Law Constitutes Reversible Error.

89. In 2001, Pennsylvania law provided that a "[p]erson, who in the course of their employment, occupation or practice of their profession, comes 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 professional or official capacity is an abused child."[14] 23 Pa.C.S. §6311 (2001).

90. During the trial in this matter, no evidence was presented to establish that Messrs. Spanier, Schultz or Curley came into contact with children in the course of their employment. See generally, N.T. (10/17/2016 - 10/27/2016).

91. Indeed, Spanier, Schultz, and Curley provided no testimony regarding contact with children in the course of their employment. See id.

92. Further still, Plaintiff presented no evidence that an abused child "c[ame] before them in their professional or official capacity," a necessary element of the mandated reporter statute. 23 Pa.C.S. §6311 (2001).

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[14]While school administrators are among those listed as an example of persons with contact with children, school refers to primary and secondary educational institutions. See 23 Pa.C.S. §§ 6303(a), 6311(b). This issue is being litigated in the criminal proceedings.

93. Plaintiff's own witness, Wendell Courtney, Esquire, testified that upon researching the matter in 2001, he determined that there was no legal duty to report the incident under Pennsylvania law. N.T. (10/17/2016 A.M.) at 58-83. This position was further echoed by the testimony of another witness called by Plaintiff, Dr. John Dranov. Id., (10/19/2016 P.M.) at 98-119.

94. Despite the lack of evidentiary support and the University's objections, the Court provided the following Jury Instruction:

> 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.

N.T. (10/27/2016) at 148-149.

95. After the jury requested clarification on the definition of misrepresentation, the Court responded as follows:

> So the elements of intentional misrepresentation which the plaintiff must prove by clear and convincing evidence

> are as follows: A representation – in other words, he is told something – that the representation is material to the transaction at hand, so it's important to the transaction; that it was made falsely with knowledge of its falsity or recklessness as to whether it is true or false, so the representation, with the intent of misleading another into relying upon it; that there was justifiable reliance on Mr. McQueary's part of the misrepresentation and that the resulting injury he suffered was proximately caused by his reliance on the representation. Again, I indicated to you that, if 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.

N.T. (10/27/2016) at 177-178.

96. Notably, at no point during the litigation did Plaintiff raise or present evidence as to whether Curley, Schultz, or Spanier qualified as mandated reporters or whether Plaintiff's 2001 report required mandatory reporting.

97. Nor did Plaintiff request the above instruction. Rather, the Court *sua sponte* provided the instruction to the jury over vigorous objection by the University. Id.

98. Further, during the re-instruction, the Court noted that if Schultz or Curley did not tell Spanier of the incident then Curley and Schultz are mandated reporters. This is not the law and this departure from the earlier, albeit erroneous, instruction improperly confused the jury.

99. When considering the adequacy of jury instructions in a civil case, an appellate court ascertains whether the trial court committed a clear abuse of discretion or error of law which influenced the outcome of the case. Lewis v. CRC Indus., Inc., 7 A.3d 841, 844 (Pa. Super. 2010).

100. 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." Id.

101. Where the charge caused fundamental prejudice, there will be cause for a new trial. See, e.g., Pringle v. Rappaport, 980 A.2d 159, 175 (Pa. Super. 2009).

102. The Court's instruction to the jury here was erroneous, an abuse of discretion, and substantially prejudiced the University. The Court's instruction to the jury here misled and confused a material issue implicating both the Plaintiff's misrepresentations and defamation claims.

103. The jury proceeded to find against the University on the misrepresentation and defamation claims.

104. The record contains no evidence that establishes the status of Spanier, Curley, and/or Schultz as mandated reporters.

105. Further, the mandated reporter instruction, which was twice provided to the jury, was so erroneous and prejudicial because it was entirely irrelevant to prove any element of intentional misrepresentation.

106. The instruction also added an automatic component, where if Plaintiff told Curley or Schultz of sexual misconduct, then the jury was compelled to find intentional misrepresentation. That is not the law, and deprived the jury of its role as arbiter of whether the University misrepresented its intentions and actions to McQueary.

107. In other words, the Court's instruction was improper and irreparably prejudicial for three reasons:

a. The issue of who is a mandatory reporter is unsettled at best. It has been the subject of extensive litigation and briefing by the Commonwealth and Curley, Spanier and Schultz in the related criminal cases;

b. The Court's instruction as to future intent of taking "appropriate action" was erroneous because the jury would have had to have found that at the time the statements were made as to future intent, the actors knew that no "appropriate action" would be taken; and

c. Therefore, even if the Court's instruction on mandatory reporters was legally correct, Curley, Spanier, and Schultz would have had to have

"known" that they were mandatory reporters at the time the statement was made.

108. The Court committed reversible error in providing the above-referenced instruction to the jury and that error prejudiced the entire proceedings. Consequently, the University is entitled to judgment notwithstanding the verdict or a new trial on the misrepresentation and defamation claims.

E. The Court Erred By Refusing to Find that The Allegedly Defamatory Statements were Opinions and Do Not Imply any Knowledge of Underlying Facts.

109. McQueary alleged two communications as the bases for his defamation claim.

110. On November 5, 2011, President Spanier issued the following statement:

> 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

111. On November 7, 2011, McQueary alleges that President Spanier reiterated his support for Curley and Schultz during meetings with the University's Athletic Department.

112. The University pleaded as New Matter that Spanier's communications were opinions and do not imply any knowledge of underlying facts. See Answer and New Matter at ¶ 73.

113. Consistent with that view, the University proposed the Court read Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.150 (4th Ed. with 2016 Supplements) - Defamation – Expression of Opinion.

114. The Court provided an instruction on opinion that deviated from the standard instruction. N.T. (10/27/2016) at 135:19-136:10.

115. A communication is defamatory if it is intended to harass the reputation of another so as to lower him or her in the estimation of the community or if it tends to deter third parties from associating or dealing with him or her. Walker v. Grand Central Sanitation, Inc., 430 Pa.Super. 236, 243, 634 A.2d 237, 240 (Pa. Super. 1993) (citations omitted). See also Constantino v. The University of Pittsburgh, 2001 PA Super 4, 766 A.2d 1265, 1270 (Pa.Super. 2001)("A communication is . . . defamatory if it ascribes to another conduct, character or a

condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession.")

116. But mere expressions of opinion are non-actionable unless the opinion implies undisclosed facts, which are capable of a defamatory meaning. Constantino, 766 A.2d at 1270.

117. President Spanier gave an opinion about what he believed the record would show at the conclusion of criminal proceedings: "I am confident the record *will* show that these charges are groundless and that they conducted themselves professionally and appropriately."

118. Spanier also explicitly referenced his longstanding professional relationship with Curley and Schultz as the basis for his opinion that the criminal charges against them would prove to be groundless.

119. Since President Spanier was not involved in the criminal investigation, he could not know what the investigation would reveal. It is therefore not reasonable for anyone to infer that his statement is based on undisclosed facts.

120. 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) ("If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo," then the statement "cannot be made [libelous] by an

innuendo which puts an unfair and forced construction on the interpretation" of the statement.).

121. 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.) (applying Pennsylvania law).

122. The University was prejudiced by the Court not finding that the allegedly defamatory statements were a matter of pure opinion and could not support a defamation claim.

123. Consequently, the University seeks judgment notwithstanding the verdict on the defamation claim, or, in the alternative, a new trial.

F. The Court Erred When It Declined to Characterize Plaintiff as a Public Figure or Limited-Purpose Public Figure, and, as such, the University was Irreparably Prejudiced by the Court's Decision not to Instruct the Jury on the Attendant Higher Burden of Proof.

124. A plaintiff's status as a public figure will affect his or her burden in a defamation case. Tucker v. Phila. Daily News, 2000 PA Super 183, 757 A.2d 938 (Pa. Super. 2000). If the plaintiff is a public official or public figure, he or she must prove that the offending statement was made with actual malice. See Norton v. Glenn, 580 Pa. 212, 216 n.3, 860 A.2d 48, 50, n.3 (Pa. 2004). Put another way,

the defendant must make the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Id.

125. 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, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966). He becomes a limited purpose public figure because he invites and merits "attention and comment." Gertz v. Welch, 418 U.S. 323, 342, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (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, 61 L. Ed. 2d 450, 99 S. Ct. 2701 (1979).

126. The public-figure standard was raised by Plaintiff when he filed 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 at ¶ 53.

127. First and without question, the Sandusky investigation and subsequent proceedings were a matter of public controversy.

128. Second, Plaintiff 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.

129. On this basis, McQueary qualifies as a limited purpose public figure.

130. Further still, McQueary was already a public figure. He was a successful University quarterback at one of the most followed colleges in America. He also served as an assistant coach for Joe Paterno, an iconic coach. Courts have been willing to characterize local high school coaches as public figures, certainly Plaintiff was such a figure as well. See Sarandrea, 30 Pa.D.&C.4th at 201 (finding high school football coach was a limited-purpose public figure). Accord Basarich v. Rodeghero, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 742 (1974) ("[C]oaches, and the conduct of such . . . coaches and their policies, are of as much concern to the community as are other "public officials" are "public figures.").

131. The University proposed that the Court provide the jury with defamation instructions consistent with alleged defamation of a public figure or limited-purpose public figure. See Proposed Points of Charge at Nos. 33, 35, 36 & 38.

132. At a conference on the first day of trial, the Court expressed skepticism about whether McQueary was a public figure, but permitted additional briefing. N.T. (10/17/2016) at 4:21-6:16.

133. Consequently, the University supported its position with a bench brief provided to the Court. See Bench Brief.

134. The University continually argued that McQueary was a public figure or a limited public figure.

135. 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.

136. The University was prejudiced by the Court's ruling that the heightened actual malice standard did not apply to the defamation claim. Plaintiff could not have met that burden and dismissal would have been warranted.

137. Consequently, the University seeks judgment notwithstanding the verdict on the defamation claim, or, in the alternative, a new trial.

G. The Court Erred When It Declined to Instruct the Jury that the Allegedly Defamatory Statement Concerned a Matter of Public Concern, and, As Such, Plaintiff Must Show that the Statement was Materially False.

138. Under Pennsylvania Law, the University had the burden of proving that the defamatory comment was about a matter of public concern. 42 Pa.C.S. § 8343.

139. The burden was easily met based on Plaintiff's allegations in the Complaint that President Spanier's statement was published to "provide full and public support" of Curley and Schultz. See Complaint at ¶ 53.

140. Furthermore, President Spanier's statement itself also demonstrates that it was a matter of public concern and addressed the criminal charges against Sandusky, Schultz and Curley. President Spanier's statement concerns whether Schultz and Curley appropriately responded to Plaintiff's assertions. The safety of children and the Sandusky investigation are self-evidently matters of public concern. It is also a matter of public concern whether the Commonwealth's largest University and its high-level employees appropriately responded to such charges. See N.T. (10/27/2016) at 10:5-12:15.

141. Statements concerning matters of public concerns must also be provable as false before liability can attach under state defamation law. See Krajewski v. Gusoff, 2012 PA Super 166, 53 A.3d 793, 803 (Pa. Super. 2012) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)).

142. Since the crux of the statement is the adequacy of the response conducted by Curley and Schultz, the testimony of Curley and Schultz is imperative to demonstrate the truth or falsity of the statement. Due to the pending criminal charges, Curley and Schultz are asserting their Constitutional privilege not to testify. Without their testimony, Plaintiff could not establish that President Spanier's confidence in Curley and Schultz was not properly founded. As such, Plaintiff could not establish defamation.

143. 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 at Nos. 33, 35, 36 & 38.

144. The Court declined to provide the jury with those instructions. See generally N.T. (10/27/16).

145. The University was prejudiced by the Court's ruling that the defamatory statement was not a matter of public concern. Plaintiff could not have met the burden and dismissal would have been warranted. See N.T. (10/27/2016) at 9:16-12:18; 15:11-25.

146. Consequently, the University seeks judgment notwithstanding the verdict on the defamation claim, or, in the alternative, a new trial.

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

V. MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, A NEW TRIAL, AND/OR REMITTITUR.

A. The Court Failed to Properly Instruct the Jury that they Could Not Duplicate Damages and the Jury's Award is Speculative, at Best.

147. Counsel for the University specifically requested that the jury be instructed that Plaintiff should not profit from or be overcompensated for any

alleged harm he sustained, *i.e.*, that a double damage award is not permissible. See Proposed Defense Instruction No. 45.

148. Counsel for the University further requested that the jury be instructed that damages may not be speculative. Id. at No. 47.

149. Indeed, no evidence or expert opinion[15] was presented that any potential employer, whether it be for a football or non-football position, denied interviewing Plaintiff or employment based on any action taken by the University. Consequently, any award for front pay is improperly speculative.

150. Similarly, Plaintiff presented no evidence to make any award for emotional damages anything but speculative.

151. The Court's failure to charge the jury regarding the prohibition against an award of double damages was erroneous and an abuse of discretion.

152. The jury's verdict of $1.15 million under the defamation claim and an additional $1.15 million under the misrepresentation claim clearly suggests that the jury improperly awarded double damages in this case. See Verdict Slip, dated

[15] John Parry, an athletic director at a Cleveland State University, testified as an expert that he did not know whether any potential employer refused to hire Plaintiff, because they were concerned about the actions taken by the University against Plaintiff. N.T. (10/24/16 (A.M.)) at 54:22-24; 103:1-12; 109:1-24. Plaintiff's economics expert, Jim Stavros, testified that he made no conclusions as to liability and he made one "big assumption" that the "primary reason, for Mr. McQueary's inability to obtain employment is as a result of the allegations in the complaint." N.T. (10/25/16 (A.M.) at 11:16-12:11.

October 27, 2016. Because special interrogatories were not used, it is impossible to know how the jury reached identical awards for each claim.[16]

153. The jury's awards further bore no relationship to the evidence and could have been the result of the jury awarding the same damages for different causes of action.

154. The jury's award is likewise speculative, a product of mistake of fact or law, and is against the weight of the evidence and/or inconsistent with Plaintiff's proof regarding the economic losses he allegedly sustained.

155. The jury's awards are plainly excessive, grossly exorbitant, and shock the conscience.

156. In such cases, the Court is empowered to award a new trial or, in the alterative, a new trial as to damages only.

157. In the alternative, the Court may remit and/or mold the verdict to the maximum amount of economic damages supported by the evidence or the law.

[16] Despite the apparent duplicative nature of the jury's award under each claim, the Court did not inquire as to whether double damages were impermissibly awarded. Furthermore, the record is devoid of any colloquy that confirms that the members of the Jury agreed with the Verdict as related to the Court by the Foreperson. See generally N.T. (10/27/16).

B. Plaintiff Failed to Show Conduct That Justified The Award of Punitive Damages.

158. Pennsylvania law regards punitive damages as "an 'extreme remedy' available in only the most exceptional matters." Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005) (quoting Martin v. Johns-Manville Corp., 494 A.2d 1088, 1098 n.14 (Pa. 1985), rev'd on other grounds sub nom., Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989)).

159. Punitive damages are not an automatic incident of a plaintiff's showing of an intentional tort. Instead, a defendant's act must be outrageous and aggravated to warrant a remedy that will punish the defendant and deter similar transgressions. See Contractor Utility Sales Co., Inc. v. Certain-Teed Corp., 748 F.2d 1151, 1156 (7th Cir. 1984) (applying Pennsylvania law). A trial court must act as gatekeeper and determine whether, as a matter of law, a plaintiff has shown the extra level of outrageousness to merit punitive damages. Id.

160. 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 Smith, the Superior Court found sufficient evidence that an agent committed fraud by misrepresenting the amount of termite damage. Smith, 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 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. If the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law." Id. (emphasis added); see also Pittsburgh Live, Inc. v. Sevov, 615 A.2d 438, 442 (Pa. Super. 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).

161. The Third and Seventh Circuits have both interpreted Pennsylvania law to require an additional quantum of outrageousness 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, 748 F.2d at 1156 (same).

162. During the trial of this matter, Plaintiff failed to demonstrate any outrageous conduct so as to warrant the imposition of punitive damages with respect to the misrepresentation claim.

163. Plaintiff claims that Curley and Schultz intentionally misrepresented to him that they would see that the University took appropriate actions so as to

induce Plaintiff not to report the matter to law enforcement. See Complaint, Par. 61.

164. Plaintiff has failed to offer sufficient evidence to establish a misrepresentation upon which Plaintiff detrimentally relied that proximately caused him harm.

165. Plaintiff testified that Curley and Schultz made the statements upon which the misrepresentation claim is based during a February 22 or 23, 2001 meeting at the Bryce Jordan Center. See N.T. (10/21/2016 A.M.) at 45; 51; and 54.

166. Plaintiff further testified that "possibly ten days, roughly a week" after the February 22 or 23, 2011 meeting in which the alleged misrepresentations were made, he received a telephone call from Curley. N.T. (10/21/2016 A.M.) at 55. During that call, Curley told Plaintiff: *"[W]e 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. "* Id. (emphasis added).

167. Curley notified Plaintiff of the steps that would be taken in response to his report. No evidence of misrepresentation was presented, and even if there was evidence of misrepresentation, Plaintiff did not show an additional quantum of outrageousness to permit punitive damages.

168. Under the circumstances of this case, Plaintiff failed to establish the necessary conduct to support an award of punitive damages.

169. WHEREFORE, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court grant judgment notwithstanding the verdict, grant a new trial, or remit or mold the jury award.

VI. MOTION FOR A NEW TRIAL

A. The Court Prejudiced the University by Refusing to Permit the University to Offer Media Accounts that Cast Plaintiff in a Negative Light in Order to Refute Any Claim that the University's Actions Harmed Plaintiff's Reputation.

170. During trial, the University sought to offer media reports which cast Plaintiff's character in a negative light and addressed his decision to leave the locker room after he found Sandusky and a child alone in the shower. N.T, (10/22/2016 A.M.) at 53:14-63:25; 80:8-86:22.

171. At times, the Court permitted the University to admit the media reports but not publish the reports to the jury, other times the Court declined to allow admission altogether.

172. Meanwhile, the Court permitted Plaintiff to admit and publish various media reports. N.T. (10/21/2016 A.M.) at 75.

173. The Court initially characterized the University's evidence of media reports as hearsay. N.T. (10/22/2016 A.M.) at 53:14-63:25; 80:8-86:22.

174. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. See Commonwealth v. Laich, 566 Pa. 19, 25, 777 A.2d 1057, 1060 (2001).

175. The articles were not hearsay, because they were not offered for the truth of the matter asserted, i.e., what Plaintiff actually did or did not do. Rather, the media reports were offered to show the negative reaction to the perception of what Plaintiff did or did not do. See, e.g., Raintree Homes, Inc. v. Birkbeck, Nos. 3651 CIVIL 2001, 2358 CIVIL 2002, 2011 Pa. Dist. & Cnty. Dec. LEXIS 164, at *1 (Pa. C.P. Monroe Sep. 8, 2011) ("If an 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."). The public reaction was critical and contrary to Plaintiff's theory that it was the University's actions which caused him harm as opposed to coverage of the Plaintiff's own actions in the locker room and immediately afterward. The media reports also corroborated the opinions of several witnesses who thought Plaintiff's own actions or inactions were the cause of his reputational harm. N.T. (10/20/2016 P.M.) at 79:11-80:12; (10/21/2016) at 132:22-142:21; (10/26/2016) at 3:2-7 (playing videotaped deposition of Matt Ruhle (7/28/2016) at 129:8-130:11).

176. If the Court was correct in characterizing the media reports as hearsay, the reports fell within an exception to the hearsay rule. Rule of Evidence 803(21) provides that out-of-court statements by any declarant showing reputation of a person's character among associates or in the community are excepted from the ban on hearsay testimony.

177. Further still, the Court treated requests for admissions of media reports differently for the Plaintiff and the University. The Court permitted Plaintiff to both admit and publish the articles to this jury. N.T., (10/18/2016 (A.M.)) at 78-84; Id., (10/25/2016 (A.M.)) at 60-62. This disparate treatment was prejudicial to the University and caused reversible error.

178. The University seeks a new trial where it is allowed to properly establish that Plaintiff's reputational harm was caused by media reports related to his own actions and inactions and not the University's actions or inactions.

B. The Court Erred when it Held that It Would Take an Adverse Inference against the University for Asserting the Attorney-Client Privilege.

179. During the trial of this matter, the Court instructed "if you are directing him to take the attorney/client privilege, then the Court is going to draw an adverse inference that his response would be negative to the University." N.T. (10/26/2016 A.M.) at 139-140.

180. A negative inference should not be drawn based on the assertion of the attorney-client privilege. Moseley v. V Secret Catalogue. Inc., 537 U.S. 418, 123 S. Ct. 1115, 155 L. Ed. 2d 1 (2003); 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.").

181. Here, the trial court erred when it determined that an adverse inference would be taken whenever the University invoked the protections of the attorney-client privilege.

C. The Court's Refusal to Present Special Interrogatories to the Jury Constitutes Reversible Error.

182. Under Pennsylvania law, a trial judge 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 issues. Century 21 Heritage Realty, Inc. v. Bair, 386 Pa. Super 373, 378 (1989).

183. The failure to present special interrogatories to the jury may constitute an abuse of discretion and reversible error where doing so would serve to eliminate confusion. See id.

184. The jury in this case was presented with multiple theories, each with different elements of proof upon which Plaintiff could recover and, as previously

discussed, a number of theories are premised upon trial court error; this caused undue jury confusion.

185. Since the Trial Court denied the University's request to present special interrogatories, it cannot be determined whether the jury's decisions on liability are valid or 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.

186. Under these circumstances, a new trial is warranted and the Court committed reversible, prejudicial error.

D. The Trial Court Committed Reversible Error by Acting as an Advocate.

187. "The trial judge is not an advocate, but a neutral arbiter interposed between the parties and their advocates. . . . With certain rare exceptions . . . the trial judge is not 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.'" Commonwealth v. Overby, 570 Pa. 328, 809 A.2d 295, 316 (Pa. 2002); see also Commonwealth v. Pachipko, 450 Pa. Super. 677, 677 A.2d 1247, 1249 (Pa.Super. 1996) (noting that it is "clearly inappropriate" for a trial judge to raise an issue on behalf of a party and act as an advocate for that party). See Commonwealth v. Edwards, 535 Pa. 575, 637 A.2d 259, 261 (Pa. 1993)) (holding that it is per se reversible error if a judge advocates on behalf of a party).

188. Multiple instances exist where the Court acted as an advocate on behalf of the Plaintiff. For example, the Court acted as an advocate on behalf of Plaintiff when it *sua sponte* instructed the jury as to the status of Curley and Schultz as mandated reporters. See supra, at ¶¶ 53-67.

189. The Court again acted as an advocate when at several points it questioned 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.

190. Under these circumstances, a new trial is warranted.

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

VII. JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE BECAUSE THE VERDICTS AND AWARDS ARE AGAINST THE WEIGHT OF THE EVIDENCE.

191. For all of the reasons set forth above, the jury's verdicts and awards are not supported by the weight of the evidence.

192. For this reason alone, this Court should enter a verdict on the defamation and misrepresentation claims on the University's behalf, or, alternatively, order a new trial.

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

The University requests the Court to set a schedule for briefing and oral argument on this motion. A proposed form of order with briefing schedule is attached.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 10th day of April 2017, a true and correct copy of the BRIEF IN SUPPORT OF POST-TRIAL BRIEF was served upon the following persons via the methods noted below.

VIA EMAIL

Honorable Thomas G. Gavin
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