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

MICHAEL J. MCQUEARY,
Plaintiff

vs.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

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No. 2012-1804

FILED IN RECORD
2015 JUL 14 PM 2:37
CENTRE COUNTY, PA
REGISTERED
PROthonotary

TYPE OF MATTER:
Whistleblower and Defamation

TYPE OF PLEADING:
Memorandum of Law in Support of
Emergency Petition

FILED ON BEHALF OF:
Non-party Graham B. Spanier

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COURT OF COMMON PLEAS
OF CENTRE COUNTY

NO. 2012-1804

CIVIL ACTION—LAW

**GRAHAM B. SPANIER'S
MEMORANDUM OF LAW IN SUPPORT OF
HIS EMERGENCY PETITION TO INTERVENE**

Non-party Graham B. Spanier seeks to intervene in this case for the purpose of filing the attached motion for protective order (Ex. A) that (1) limits the deposition of non-party witness Cynthia Baldwin to non-privileged testimony, (2) permits counsel for Dr. Spanier to attend Ms. Baldwin's deposition and assert the attorney-client privilege on Dr. Spanier's behalf, and (3) directs Ms. Baldwin not to answer any questions to which Dr. Spanier's counsel lodges an objection on the basis of attorney-client privilege. Dr. Spanier is not a party to this action and is not the person from whom deposition testimony is sought, and so this Court should grant Dr. Spanier leave to intervene in this case so that he may assert his attorney-client privilege.

I. PROCEDURAL HISTORY

On October 2, 2012, Plaintiff filed a complaint asserting whistleblower, defamation, and misrepresentation claims against defendant Pennsylvania State University (“PSU”). Dr. Spanier was not named in the suit, but several of the allegations in the Complaint relate to actions allegedly taken or statements allegedly made by Dr. Spanier. *See* Compl. ¶¶ 28-29, 50-51, 53-58. Dr. Spanier is currently the subject of criminal proceedings involving allegations related to those made against PSU in this case.

II. STATEMENT OF FACTS

Plaintiff has noticed the deposition of Cynthia Baldwin, who previously acted as Dr. Spanier’s attorney in relation to matters that are the subject of Plaintiff’s complaint. *See* June 26, 2015 Ltr. From N. Conrad to E. Ainslie, attached to Spanier’s Motion for Protective Order as Exhibit 2. Dr. Spanier now seeks to intervene in this matter for the limited purpose of preventing Ms. Baldwin from disclosing privileged communications.

III. QUESTION PRESENTED

Should this Court allow non-party Graham B. Spanier to intervene under Pa. R. Civ. P. 2327(4) for the purpose of filing a motion for protective order when Plaintiff is seeking deposition testimony from Dr. Spanier’s former attorney relating to matters protected by the attorney-client privilege?

SUGGESTED ANSWER: Yes.

IV. ARGUMENT

Pennsylvania Rule of Civil Procedure 2327(4) provides that at any time during the pendency of an action, a non-party shall be permitted to intervene if determination of the action may affect a legally enforceable interest of the non-party. *See also* 3 STANDARD PA. PRACTICE 2d § 14:364 (2009). Rule 2327(4) is satisfied where a party has “some right, whether legal or equitable, which will be affected by the proceedings.” *Acorn Dev. Corp. v. Zoning Hr’g Bd. of Upper Merion Twp.*, 523 A.2d 436, 437-38 (Pa. Cmwlth. 1986) (quoting 8 Goodrich-Amram 2d §2327:7). Intervention is appropriate when a “cause of action of the applicant’s own . . . will be affected” by the action in which intervention is sought. 3 STANDARD PA. PRACTICE 2d § 14:363 (2009). *See also Marion Power Shovel Co. v. Fort Pitt Steel Casting Co.*, 426 A. 2d 696, 700 (Pa. Super. 1981).

Intervention is warranted in this case because the deposition of Cynthia Baldwin will very likely include testimony about matters protected by the attorney-client privilege. On June 26, 2015, counsel for PSU notified the undersigned that Plaintiff had noticed the deposition of Ms. Baldwin for July 21, 2015. *See* Ex. 2 to Spanier’s Motion for Protective Order. The allegations in Plaintiff’s complaint against PSU directly relate to the events underlying the criminal charges pending against Dr. Spanier. Compl. ¶¶ 50-51, 53 (alleging that the statements made by Dr. Spanier “clearly suggest that the Plaintiff was lying in his reports and testimonies that he had reported the sexual misconduct” of Gerald Sandusky and lied to law enforcement officials and committed perjury during the grand jury investigation as to his reporting of Sandusky’s misconduct to PSU).

It is clear based on the allegations in the complaint that Plaintiff intends to ask about and explore subjects that Dr. Spanier has repeatedly asserted are privileged, based on Ms. Baldwin's role as his individual attorney during his grand jury appearance and in his interview with the Office of Attorney General before that appearance. Indeed, there could be no other purpose in deposing Ms. Baldwin other than to ask about privileged communications. In the criminal case, Dr. Spanier filed motions to dismiss the charges against him and to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin's testimony breached the attorney-client privilege and the charges against him were based on Ms. Baldwin's improper grand jury testimony. On January 14, 2015, the Court of Common Pleas of Dauphin County (Hoover, J.) issued an order and opinion holding that no individual attorney-client relationship existed between Dr. Spanier and Ms. Baldwin. *See Commonwealth v. Spanier*, No. 3615 CR 2013, slip op. at 27-28, attached to Spanier's Motion for Protective Order as Exhibit 1.

Dr. Spanier filed an immediate appeal as of right from the January 14 order. *See Commonwealth v. Harris*, 32 A.3d 243, 251 (Pa. 2011) (holding that orders denying claims of privilege are immediately appealable as of right). The final merits brief in that appeal was filed on July 9, 2015, and the Superior Court has scheduled oral argument for August 11, 2015. Accordingly, no final determination has been made as to whether Dr. Spanier had an individual attorney-client relationship (and so, an individual attorney-client privilege) with Ms. Baldwin. The criminal case has been stayed pending the outcome of Dr. Spanier's appeal.

Because proceeding with Ms. Baldwin's deposition without the entry of a protective order would affect Dr. Spanier's interest in protecting the attorney-client privilege, he should be permitted to intervene to file the attached motion for protective order.

V. CONCLUSION

For these reasons, Dr. Spanier respectfully requests that the Court grant Dr. Spanier's petition to intervene pursuant to Rules 2327 and 2328 and file the attached motion for protective order.

Respectfully submitted,



Dated: July 14, 2015

Elizabeth K. Ainslie (I.D. No. 35870)
Stephen J. Shapiro (I.D. No. 83961)
Christian D. Sheehan (I.D. No. 314598)
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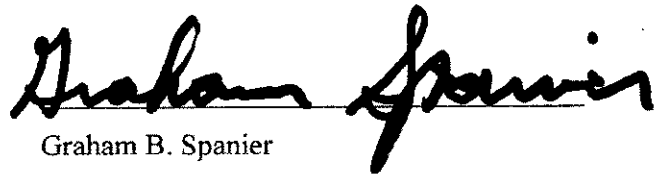
Attorneys for Non-Party Graham B. Spanier

Attorneys for Non-Party Graham B. Spanier

VERIFICATION

I, Graham B. Spanier, verify that the statements made in the foregoing Petition to Intervene are true and correct to the best of my knowledge, information and belief. I understand this verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.


Dated:


Graham B. Spanier

VERIFICATION

I, Christian D. Sheehan, counsel for Graham B. Spanier, verify that Dr. Spanier is not immediately available to provide counsel with his original signature on the Verification in support of the foregoing Petition to Intervene. I have attached to this Petition a scanned version of the Verification signed by Dr. Spanier. The original signed Verification will be substituted for the scanned version as soon as counsel receives it. I understand that my verification is subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: July 13, 2015



Christian D. Sheehan, Esq.

Counsel for Graham B. Spanier

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Graham B. Spanier's memorandum of Law in Support of His Emergency Petition to Intervene has been served by electronic mail and U.S. first class mail, postage prepaid, on this 14th day of July, 2015 to the following attorneys:


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