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

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DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS

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INTRODUCTION

The Plaintiff, Michael J. McQueary, hereby submits this Brief in Support of his Answer to Defendant's Preliminary Objections, respectfully requesting that the Defendant's Preliminary Objections be overruled.

The Defendant's Memorandum of Law ignores facts pled in the Complaint and the standard for deciding preliminary objections.

> "The court may sustain preliminary objections only when, based on the facts pleaded, it is **clear** and **free from doubt** that the complainant will be **unable** to **prove facts** legally **sufficient** to **establish** a **right** to **relief**. (citation omitted). For the purpose of evaluating the legal sufficiency of the challenged pleading, the court must **accept** as **true** all well-pleaded, material, and relevant **facts alleged** in the **complaint** and **every inference** that is fairly deducible from those facts."

Mazur v. Trinity Area School District, 961 A.2d 96, 101 (Pa. 2008). (emphasis added). Put another way, "[P]reliminary objections should be sustained "only where it appears with certainty, that the law permits no recovery under the allegations pleaded." Al Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 190 (Pa. Super. 1994). "When a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it." Snyder v. Specialty Glass Products, Inc., 658 A.2d 366, 368 (Pa. Super 1995).

Relying mainly upon inapposite precedent, most of which are summary judgment cases, the Defendant has fallen woefully short of the heavy burden necessary to support its preliminary objections.

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The arguments in this Brief will follow the order in which they appear in the Defendant's Memorandum of Law in Support of its Preliminary Objections.

COUNTER-STATEMENT OF FACTS

The Plaintiff submits that the Defendant's "Statement of Facts" is materially incomplete. However, in view of this Court's familiarity with the Complaint gained by virtue of its prior hearing and determination of the Defendant's Motion to Stay, Plaintiff believes it more efficient to raise the facts pled in the Complaint but ignored by the Defendant in the argument sections of this Brief.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Can a demurrer be sustained when Dr. Spanier's statements are capable of defamatory meaning because they impute that the Plaintiff lied to law enforcement authorities and to the Grand Jury?

Suggested Answer: No

2. Can a demurrer be sustained when a misrepresentation about a present intention was false when uttered?

Suggested Answer: No

3. Can preliminary objections alleging insufficient specificity be sustained when the material facts on which each count is based are stated in a concise and summary form.

Suggested Answer: No

ARGUMENT

A. **Because Spanier's statements are capable of defamatory meaning, the demurer to Count II must be overruled.**

Defendant begins its argument by maintaining that Count II, Defamation "Fails Because Spanier's Statements ARE NOT Defamatory As A Matter of Law". (p. 8, Defendant's Memorandum of Law).

Supplementing the general rules governing preliminary objections referred to in the Introduction section of this Brief, is precedent specifically dealing with defamation actions.

In the case of MacElree v. Philadelphia Newspapers Inc., 674 A.2d 1050 (Pa. 1996), the Pennsylvania Supreme Court reiterated the well-established rule that, at the preliminary objection stage:

> "It is the court's duty to determine if the publication **is capable of** the **defamatory meaning** ascribed to it by the party bringing suit." 674 A.2d at 1053. (emphasis added).

MacElree also held that when "there was **doubt as to** the **defamatory nature** of the Complaint of language, appellees' **demurrer** should have been **overruled**." 674 A.2d at 1055. (emphasis added).

When "a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury." Green v. Mizner, 692 A.2d 169, 174 (Pa. Super. 1997). Furthermore, a court must view the challenged communications in their factual context, which includes the nature of the audience(s) Agriss v. Roadway Express Inc., 483 A.2d 456 (Pa. Super 1996). It is also not necessary that the

party defamed be specifically named in the communication, if pointed to by circumstances tending to identify him. Cosgrove Studio and Camera Shop Inc. v. Pane, 182 A.2d 751 (Pa. 1962).

The complained of defamations by Dr. Spanier were made in the following context.

Paragraph ¶15 of the Complaint avers that "the Plaintiff met with Athletics Director Curley and Senior Vice President Schultz in a conference room in the Bryce Jordan Center and told them about the aforementioned [in ¶ 10 of the Complaint] highly inappropriate sexual misconduct that he had witnessed the night of February 9, 2001."

Further, ¶23 of the Complaint avers:

> "On December 14, 2010, the Plaintiff testified in Harrisburg, Pennsylvania, before a Statewide Investigating Grand Jury about what he had witnessed in the Lasch Football Building Support Staff Shower Room as described in ¶10 above. Also, included in the Plaintiff's Grand Jury testimony was that he had reported the incident to Athletics Director Curley and Senior Vice President Schultz."

Then, ¶ 26 of the Complaint avers that:

> "On or about November 4, 2011, the Statewide Investigating Grand Jury issued a Presentment finding, among other things, that Athletics Director Curley and Senior Vice President Schultz each made a materially false statement to the Grand Jury concerning the Plaintiff's report of sexual misconduct to them."

Defendant's President Spanier published the complained of written statement on Penn State Live on Saturday, November 4, 2011 (Complaint ¶28), stating that "these charges are groundless" (Exhibit B to the Complaint) and

verbally reiterated that the criminal charges were "groundless" to a meeting of numerous athletic department staff on November 7, 2011. (¶ 29 of the Complaint).

Because the charges against Curley and Schultz were making "a materially false statement to the Grand Jury concerning Plaintiff's report of sexual misconduct to them," President Spanier's statements that the charges against them were groundless "clearly suggest that the Plaintiff was lying in his reports and testimonies that he reported the sexual misconduct he had witnessed on February 9, 2001 to Athletic Director Curley and Senior Vice President Shultz" (Complaint ¶ 50) and had "lied to law enforcement officers and committed perjury." (Complaint ¶ 51).

Further, in ¶ 53 of the Complaint Plaintiff avers that:

> "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 to two criminal defendants in an effort to assist in their exoneration (regardless of their guilt or innocence) in the belief that their exoneration would help to preserve the reputation of the Defendant, to **isolate the Plaintiff** and to **make the Plaintiff the scapegoat** in this matter." (emphasis added).

The Defendant University, maintains on page 16 of its Brief:

> "Instead, the **only logical reading** and inference is that Spanier was trying to support Schultz and Curley by helping to restore their reputation, shield them from premature public judgment, and protect their professional livelihoods." (emphasis added).

This alleged "only logical reading" conflicts with and ignores the President's intent, as averred in ¶53 of the Complaint, that the publications were made

with actual malice and/or with reckless disregard for the truth in an outrageous effort . . . to isolate the Plaintiff and make the Plaintiff the scapegoat in this matter."

Further, ¶55 of the Complaint avers that the President's statements "have irreparably harmed the Plaintiff's reputation for honesty and integrity . . . and Plaintiff's ability to earn a living" and "have subjected the Plaintiff to public scorn and vilification." (¶56). Also, ¶57 of the Complaint, avers that the President's statements to staff of the Athletic Department have caused certain of them to distance themselves from the Plaintiff and/or cease to communicate or socially interact with him. If the only logical reading and inference was as Defendant University claims, then the Plaintiff would not have suffered the aforementioned injuries from others.

Further, as is alleged in ¶54 of the Complaint, "The Defendant's continued financial support for Athletics Director Curley and Senior Vice President Schultz and its maltreatment toward the Plaintiff[1] reinforces the perception that the Plaintiff has lied and committed perjury."

The seminal case of Cosgrove Studio and Camera Shop Inc. v. Pane, 182 A.2d 751 (Pa. 1962) illustrates how the context of a statement can make it capable of defamatory meaning. At issue in Cosgrove Studio was the following advertisement:

[1]Maltreatment set forth in ¶¶30-45 of the Complaint.

"USE COMMON SENSE *** you get NOTHING for NOTHING!

WE WILL NOT

1. Inflate the prices of your developing to give you a new roll free!
2. Print the blurred negatives to inflate the price of your snapshots!
3. Hurry up the developing of your valuable snapshots and ruin them!
4. Use inferior chemicals and paper on your valuable snapshots!"

Id. at p. 752. Although the Plaintiff was not named in this advertisement, he was a competitor of the defendant who had just run a free roll of film promotion. The Pennsylvania Supreme Court held that:

> "The fact that the plaintiff is not specifically named in the advertisement is not controlling. A party defamed need not specifically be named, if pointed to by description or circumstances tending to identify him. (citation omitted).

Id. at p. 753. Additionally, the Supreme Court held that the foregoing advertisement was defamation because "the advertisement clearly imputes to the person to whom it refers, characteristics and conduct which are incompatible with the proper lawful practice of a business." Id. at p. 753.

So too, Spanier's statements impute to the Plaintiff that he lied and committed perjury in reporting and testifying that in February 2001, he told Curley and Schultz, about the sexual misconduct he had witnessed.

In order for the charges against Curley and Schultz to be "**groundless**," as Dr. Spanier claimed (See ¶28 and 29 of the Complaint), the clear suggestion, or imputation is that Plaintiff lied when testified he had reported the sexual misconduct to them. (See ¶¶50 and 51); Cosgrove v. Pane.

The imputation that Plaintiff lied is an imputation that Plaintiff committed perjury. Perjury is a crime. And, it is axiomatic that imputation of commission of a crime is defamation per se.

The Defendant imagines, beginning at page 14 of its Brief, that because the Complaint uses "actual malice/reckless disregard for the truth" language, the Plaintiff is asserting he is a public figure for defamation purposes. The Complaint does not aver, nor is it a reasonable inference from the facts as averred in the Complaint, that the Plaintiff is a public figure or a limited purpose public figure. A limited purpose public figure is a

> "nonpublic person(s) who 'are nevertheless intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large.'"

Gertz v. Robert Welch Inc., 418 U.S. 323, 337 (1974).

As ¶53 of the Complaint avers, President Spanier issued his publications

> "with actual malice and/or with reckless disregard for the truth in an outrageous effort to provide full and public support of the University to two criminal defendants in an effort to assist in their exoneration (regardless of their guilt or innocence) in the belief their exoneration would help to preserve the reputation of the defendant, to isolate the plaintiff and make the plaintiff the scapegoat in this matter."

Thus, the term "malice" utilized does not signal the Plaintiff's belief that he is a public figure for purposes of the law of defamation; clearly he is not.[2]

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[2] See, American Future Systems Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 395 n. 6, (Pa. 2007) referencing the two kinds of malice.

In sum, Dr. Spanier's statements, when considered in context, are "capable of the defamatory meaning" ascribed to it by the "party bringing suit." (MacElree, 674 A.2d at 1053). Even assuming arguendo, the existence of alternative plausible innocent interpretations, such would have to proceed for jury. Green v. Mizner, supra. Any doubts about the defamatory meaning, they must be resolved in favor of denying the demurrer. MacElree, supra. Accordingly, the Defendant's preliminary objection to Count II must be denied.

B. Curley and Schultz's misrepresentation was an actionable statement of present intention which was false when uttered.

Next, the Defendant argues for dismissal of Count III for two reasons. The first reason allege that Count III is "based upon a non-actionable future promise. (p. 17 of Defendant's Memorandum).

Paragraph 60[3] of the Complaint avers that, after the Plaintiff told Curley and Schultz about the highly inappropriate sexual misconduct he had witnessed the night of February 9, 2001, they "intentionally misrepresented to the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Paragraph 60 further avers that Curley and Schultz had already decided, unbeknownst to the Plaintiff:

> "to pursue a course of action that would avoid an investigation by any law enforcement investigator or other

[3]Paragraph 60 of the Complaint contains a typographical error in referring to the meeting of February 2011, when it's clear that the reference is to the meeting of February 2001, as is recognized on page 13 of the Defendant's Preliminary Objections, at note 2.

trained investigator and try to keep Plaintiff's report, and the underlying incident, a secret in an effort to preserve the reputation of the Defendant University."

The Defendant, on page 18 of its Memorandum, relies upon Huddleston v. Infertility Center of America, 700 A.2d 453, (Pa. Super 1997) and New Hope Books Inc. v. Data Vision, Prologix Inc., 2003 WL21672991, *6, in arguing that "Curley and Schultz's representations were "mere breaches of a promise to do something in the future [which] cannot serve as sufficient support for a misrepresentation claim." (p. 18, Defendant's Memorandum).

In Huddleston, a surrogate mother sued the Infertility Center of America alleging, among other things, fraudulent representation as to the quality of its surrogacy program and how it would proceed post-birth. Id. at 700 A.2d at 455. The Pennsylvania Supreme Court agreed with the trial court's conclusion that statements about the quality of the surrogacy program "amounted to mere 'puffing' , rather than fraud." (citation omitted). And its promise to treat the surrogacy undertaking as an adoption is merely an unfulfilled promise to do something in the future, which does not constitute fraud." Id. at 700 A.2d at 461. Unlike the present case, there was no allegation in Huddleston that the representations were false when uttered.

Similarly in New Hope Books. supra. (Attached as Exhibit C to the Defendant's Memorandum), a customer sued a vendor of UPC barcode labels for quality misrepresentations made on its website and misrepresentations made by a sales representative promoting the company. The court in New Hope Books reiterated that "puffing is not actionable in fraud . . .

misrepresentation 'must be distinguished from mere 'puffing'". (Id. at p. 5). Again, unlike this case, there was no claim in New Hope Books that the speaker knew his representations to be false at the time the representations were made.

It has long been the law in Pennsylvania that

> "A statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of a fact."

Brentwater Homes v. Weibley, 369 A.2d, 1172, 1175 (Pa. 1977). See also, Fienberg v. Central Asia Capital Corp., 974 F.Supp. 822, 841(E.D. Pa. 1997); Killian v. McCullough, 850 F.Supp. 1239, 1255 (E.D. Pa. 1994); and Phoenix Technologies Inc. v. TRW Inc., 834 F.Supp. 148, 152 (E.D. Pa. 1993).

The Complaint is very clear that Curley and Schultz made their misrepresentations to the Plaintiff at a time when they had already "decided to pursue a course of action that would avoid an investigation by an law enforcement investigator or other trained investigator and try to keep Plaintiff's report, and the underlying incident, a secret in an effort to preserve the reputation of the University."[4] Curly and Schultz were not puffing. Nor were they promising future performance. To the contrary, Curley and Schultz made a representation to the Plaintiff that they knew at the time was false.

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[4]In footnote 3 on page 13 of its Brief, Defendant suggests that it will raise the affirmative defense of statute of limitations, which is two years from the date of the misrepresentation or the date when Plaintiff knew or had reason to know of the misrepresentation. In the case at bar, if the Defendant raises the statute of limitations, the Plaintiff will have the opportunity to plead as to the date, well within the two year statute of limitations when he discovered that Curley and Schultz had already decided to cover up at the time they met with him in February 2001.

Next, beginning on page 19 of its Memorandum, the Defendant argues that "the alleged misrepresentation is too remote to have proximately caused Plaintiff's alleged damages" the Defendant makes a "lapse in time" argument relying on two cases, neither one of which supports its legal argument or dismissal of Count III at the preliminary objection stage.

First Defendant cites Commerce Bank v. First Union National Bank, 911 A.2d 133 (Pa. Super. 2006). In that case the Superior Court affirmed the grant of summary judgment on the basis of a failure to establish a duty owed by First Union Bank to Commerce Bank. In **dicta**, the Superior Court stated that it would have affirmed the trial court's grant of summary judgment for lack of proximate cause because

> "First Union's actions were only **one minor factor** in the entire chain of events leading to the second check-kiting scheme involving Appellant's account."

911 A.2d at 142. (emphasis added).

On page 20 of its Memorandum, the Defendant also relies upon Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863 (Pa. Super. 2000) for the proposition that "proximate cause must 'be determined by the judge and it must be established before the question of actual cause is put to the jury.'" Quoting from Brown v. PCOM, 760 A.2d at 868.

The plaintiff does not quarrel with the proposition that proximate cause is a legal question to be determined by the trial judge before the case is submitted to the jury. In fact, Brown v. PCOM was a post-trial appeal. More to the point for the case at bar, is the Superior Court statement that "Proximate

causation is defined as a wrongful act which was a **substantial factor** in bringing about Plaintiff's harm." 911 A.2d at 141. In Brown v. PCOM, the Superior Court held that in the case before it, "It is abundantly clear that factors other than the negligence of PCOM had a **far greater affect** in producing the harm complained of by the Browns." 760 A.2d at 869. (emphasis added).

Neither of the two cases relied upon by the Defendant discusses process of evaluating the passage of time. Rather, they focused on other factors that had a far greater effect upon the resulting injury than the wrongful acts identified by the plaintiffs in those cases.

There is no bright-line test, as Defendant would imply, for establishing a time limit on proximate cause. In fact, the Commonwealth Court stated,

> "Where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long it is, is not sufficient to prevent it from being the legal cause of the other harm."

Taylor v. Jackson, 643 A.2d 771, 776 (Pa. Cmwlth. 1994), quoting from comment (f) of the Restatement (second) of Torts §433(c).

Further, there is no shortage of cases in which a tortious act occurs (often medical malpractice or product liabilities cases) years before it is discovered, and proximate cause is never an issue. E.g., Ayers v. Morgan, 154 A.2d 788 (Pa. 1959) (9+ years from the date of surgery until discovery of malpractice).

More importantly, at the preliminary objection stage, the court cannot sustain an objection based upon the passage of time unless it can, "with certainty" (Al Hamilton Contracting, 644 A.2d at 190) conclude that the misrepresentation could not have been a substantial factor in bringing about the injuries complained of. That cannot be done at this stage.

Accordingly, Defendant's second preliminary objection to the misrepresentation count must be overruled.

C. The three counts in Plaintiff's Complaint plead the material facts upon which each cause of action is based.

Pa.R.C.P. 1019(a) provides

> "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

Thus, the drafter of a complaint (or answer) is required to state material facts "in a concise and summary form." All three counts of the Complaint in the case at bar comply with this requirement.

The Defendant complains, we submit disingenuously, that with respect to Count I, the Defendant "does not have sufficient notice as to whether Plaintiff asserts a statutory whistleblower claim or common law wrongful discharge claim." (p. 22, Defendant's Memorandum). First, Count I of the Complaint is designated, in bold print at the top of page 9 of the Complaint, as **Whistleblower**. Then, Defendant states that "the Complaint makes no references to a wrongful discharge claim," and then argues that "Plaintiff

cannot viably assert a wrongful discharge claim." (p. 24, Defendant's Memorandum).

Defendant cannot credibly assert that it has insufficient notice that Plaintiff is bringing a whistleblower action and not a "wrongful discharge" claim. Count I is conspicuously labeled in bold print. The Complaint contains **no** references to a wrongful discharge claim. Last, wrongful discharge is an exceedingly rare common law tort, with factual and legal elements not present here. Legally there can be no wrongful discharge claim. Accordingly, Defendant's claim that it doesn't know whether Count I is a whistleblower claim males little sense to the Plaintiff.

Further, even if Count I wasn't conspicuously labeled, under the Pennsylvania Rules of Civil Procedure, "It is not necessary that the plaintiff identify the specific legal theory underlying the complaint." Krajsa v. Keypunch, Inc., 622 A.2d 355, 357 (Pa. Super. 1993).

Thus, the Defendant's preliminary objection of Count I for lack of specificity must be overruled.

The Defendant argues that Count II fails "because Plaintiff does not plead an explanation defining the defamatory meaning which he attached to the statements." (p. 26, Defendant's Memorandum). That is incorrect.

Paragraph 23 of the Complaint avers that "included in the Plaintiff's Grand Jury testimony was that he had reported the incident [described in ¶10 of the Complaint] to Athletics Director Curley and Senior Vice President Schultz." Paragraph 26 of the Complaint avers that the Grand Jury

Presentment charged that "Athletics Director Curley and Senior Vice President Schultz each made a materially false statement to the Grand Jury concerning Plaintiff's report of sexual misconduct to them." Paragraph 28 of the Complaint alleges President Spanier published a written statement on Penn Live, Exhibit B to the Complaint, calling the charges against Curley and Schultz "groundless," and, as averred in ¶29 of the Complaint, Spanier reiterated at a meeting to numerous staff of the Athletics Department that the charges against Curley and Schultz "were groundless".

Paragraphs 50 and 51 of the Complaint aver that Spanier's statement that the charges against Curley and Schultz were groundless, "clearly suggest" imputation that in contrast, the Plaintiff was lying, and committed perjury when he testified that he had reported the incident set forth in ¶10 of the Complaint to Curley and Schultz.

It is respectfully submitted that the Complaint explicitly makes clear the defamatory meaning attached to Spanier's statement. The charges against Curley and Schultz could not be "groundless" unless the Plaintiff lied to the Grand Jury. Even assuming arguendo that somehow the Defendant could conjure up a non-defamatory interpretation of Spanier's groundless statement when "a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issues must proceed to a jury". Green v. Mizner, 692 A.2d at 174.

Next, the Defendant preliminarily objects that it "does not have sufficient notice as to whether Plaintiff asserts a negligent misrepresentation or an intentional misrepresentation claim." (p. 28, Defendant's Memorandum).

Paragraph 60 of the Complaint specifically avers that Curley and Schultz "**intentionally misrepresented** to the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." (emphasis added). Paragraph 61 further specifies that Curley and Schultz "**intended** that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority." (emphasis added).

After, conceding that from ¶60 and ¶61 of the Complaint "it appears that Plaintiff is asserting a claim for intentional misrepresentation" (p. 29, Defendant's Memorandum), Defendant goes on to claim that "it remains unclear whether Plaintiff is instead asserting a claim for negligent misrepresentation due to (1) the generic titling of Plaintiff's "Misrepresentation" claim and (2) the totality of allegations contained in the Complaint." Id. Defendant does not explain how the totality of the allegations contained in the Complaint or any allegation in Count III could lead to the conclusion that Curley and Schultz made a negligent misrepresentation to the Plaintiff. But nevertheless, as was noted in Section C.1 of this Brief: "It is not necessary that the Plaintiff identify the specific legal theory underlying the Complaint." Krajsa v. Keypunch Inc., 622 A.2d 355, 357 (Pa. Super. 1993).

Defendant's legal authority for its position is misplaced. In Yakubov v. GEICO, 2011 WL5075080 (E.D. Pa.), (Attached as Exhibit F to the Defendant's Memorandum), the "plaintiff characterized the amended complaint as alleging intentional misrepresentation. Further, the amended complaint describes intentional conduct." (Slip Opinion, p. 3). However, the Yakubov Court found the amended complaint defective because "Plaintiff does not allege with specificity who made the statements, when or where the statements were made, what the statements were, or how the statements were communicated." (Slip Opinion, p. 4). However, in the case at bar, ¶¶15, 16, 60, and 61 of the Complaint have alleged with specificity who made the statements, when and where the statements were made, what the statements were, and how they were communicated.

Similarly, the case of Coronado Condominium Association Inc. v. Iron Stone Coronado LP, et al., (Attached as Exhibit E to the Defendant's Memorandum), concerned a count which purported to state a claim for fraud and misrepresentation. In that case, while the court stated that the complaint did not "identify the type of representation (sic) for which it seeks relief", Id. at p. 2, it sustained defendant's preliminary objections and granted leave to the plaintiff to amend count III to separate the fraud and misrepresentation claims required by Pa.R.C.P. 1020. Certainly, there is nothing in Pa.R.C.P. 1020 that requires that the specific legal theory for recovery be identified.

Accordingly, Defendant's objections that the three counts of the Complaint fail for lack of specificity, are without merit.

D. Counts II and III aver outrageous conduct supporting punitive damages to survive demurrer.

Defendant avers that the claims for punitive damages under Counts II (Defamation) and Count III (Misrepresentation) should be dismissed with prejudice for failure "to plead facts amounting to outrageous conduct."

As the Pennsylvania Supreme Court has articulated,

> "Punitive damages may be awarded for conduct that is outrageous, because of the **Defendant's evil motive or** his **reckless indifference** to the rights of others." (citations omitted). (emphasis added).

Hutchison v. Luddy, 870 A.2d 766, 770 (Pa. 2005). Further, the Court ruled,

> "When assessing the propriety of the imposition of punitive damages, '[t]he state of the mind of the actor is vital. The **act** of the failure to act, must be **intentional**, **reckless or malicious**.

Id., 870 A.2d at 770. (emphasis added).[5]

Plaintiff avers that Exhibit C attached to the Complaint

> "was published by President Spanier with actual malice[6] and/or with reckless disregard for the truth in an outrageous effort to provide full and public support of the University to criminal defendants in an effort to assist in their exoneration (regardless of their guilt or innocence) in the belief that their exoneration would help to preserve the reputation of the Defendant, to isolate the Plaintiff and to

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[5]Hutchison also held that punitive damages may be awarded in cases sounding in negligence. 870 A.2d at 772.

[6]Pa.R.C.P. 1019(b) provides, in part, that

"Malice, intent, knowledge and other conditions of mind may be averred generally."

make the Plaintiff the scapegoat in this matter." (Complaint ¶53).

Similarly, with respect to the misrepresentation count, ¶60 avers that the intention of Curley and Schultz was "to pursue a course of action that would avoid an investigation . . . and try to keep Plaintiff's report and underlying incident, a secret." Paragraph61 of the Complaint alleges the intent was to "induce the Plaintiff not to report the matter to any other law enforcement authority."

Thus, Counts II and III of the Complaint plead the intent, evil motive and reckless indifference to the rights of others, namely Plaintiff, requisite to support claims for punitive damages.

Ordinarily the question of punitive damages is determined by the jury. The court can only decide the issue when no reasonable inference from the facts alleged supports an award of punitive damages. Eagle Traffic Control v. Addco, 889 F.Supp. 200 (E.D. Pa. 1995) (applying Pennsylvania law).

CONCLUSION

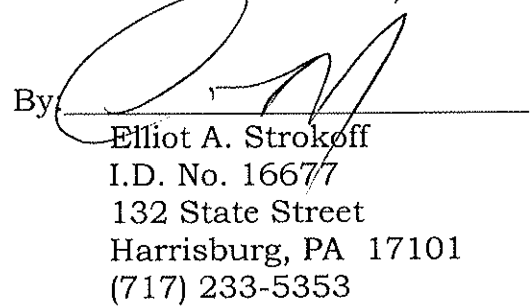
Accepting as true all well-pleaded, material, and relevant facts, and every inference that is fairly deducible from them, the Defendant's preliminary objections cannot be sustained. This is so because it is only when, based on the facts pleaded, it is clear and free from doubt that the Plaintiff will be unable to prove facts legally sufficient to establish a right to relief. Any and all doubts,

including any doubts as to defamatory meaning, must be resolved in favor of denying the demurrer.

Accordingly, Defendant's preliminary objections should be overruled.

Respectfully submitted,

STROKOFF & COWDEN, P.C.



By ________________________

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DATE: 3/7/13

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

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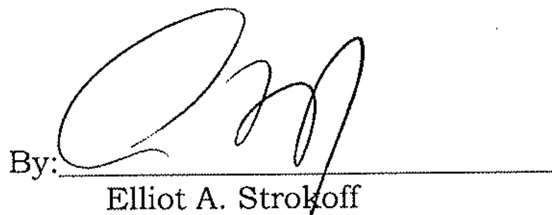
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day served a true and correct copy of the foregoing by UPS overnight delivery, on the following person(s):

Nancy Conrad, Esq.
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034



Dated: 3/7/13 By: ______________________
Elliot A. Strokoff