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IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

Docket No. 2012-1804

(Judge Gavin)

**PLAINTIFF'S PROPOSED
POINTS FOR CHARGE**

1. Admissions of Fact.

The admission(s) of fact by the Defendant in its Responses to the Plaintiff's Requests for Admissions have been offered by the Plaintiff and received in evidence. The Defendant is bound by these admissions. (Standard Civil Jury Instruction 2.40).

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2. Deposition Testimony and Videotaped Testimony.

Before the trial began, the lawyers for the parties questioned Matt Rhule, Tom Bradley and Earnest Wilson under oath and the court reporter and/or videographer recorded everything the witness and the lawyers said. This is called a deposition or a videotaped deposition.

You have heard that sworn testimony. Those witnesses' testimony is entitled to the same consideration as if they testified in court. You should use the same factors to evaluate the believability of this testimony as if they testified in person in the courtroom. (Standard Civil Trial Instruction 3.00).

3. Vicarious Liability.

The Pennsylvania State University (Penn State) can act only through its officers, agents, and employees. Any act or omission of an officer, agent or employee of Penn State performed within the scope of his or her employment is chargeable to Penn State. (Standard Jury Instruction 6.30).

In this case it is admitted that Graham Spanier, Cynthia Baldwin, Gary Schultz, Tim Curley, Lisa Powers, and Bill Mahon, were employees of Penn State, and that Board President Steve Garban was an officer of Penn State. At the time of the occurrences complained of this case, these named individuals were engaged in furthering Penn State's interests, activities, affairs or business. Under such circumstances, Penn State would be liable for any negligent acts or omissions, or intentional acts or omissions which you find that they, or any of them committed. (Standard Civil Jury Instruction 6.70; 6.100).

4. Believability of Witnesses Generally.

As judges of the facts, you decide the believability of the witnesses' testimony. This means that you decide the truthfulness and accuracy of each witness's testimony and whether to believe all, or part, or none of each witness's testimony:

- a. How well could each witness see, hear, or know the things about which he or she testified?
- b. How well could each witness remember and describe those things?
- c. Was the ability of the witness to see, hear, know, remember, or describe those things affected by age or any physical, mental, or intellectual disability?
- d. Did the witness testify in a convincing manner? How did the witness look, act and speak while testifying?
- e. Was the witness's testimony uncertain, confused, self-contradictory, or presented in an evasive manner?
- f. Did the witness have any interest in the outcome of this case, or any bias, or any prejudice, or any other motive that might have affected his or her testimony?
- g. Was a witness's testimony contradicted or supported by other witnesses' testimony or other evidence?
- h. Does the testimony make sense?

i. If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy cast doubt upon the rest of that same witness's testimony. You should consider whether the inaccuracy is in an important matter or a minor detail.

You should also consider any possible explanation for the inaccuracy. Did the witness make an honest mistake or simply forget, or was there a deliberate attempt to present false testimony?

j. If you decide that a witness intentionally lied about a significant fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony. But, you are not required to do so.

k. As you decide the believability of other witnesses and other evidence in the case.

l. If there is a conflict in the testimony, you must decide which, if any, testimony you believe is true.

As the only judges of believability and facts in this case, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever weight you think it is entitled to receive. (Standard Civil Jury Instruction 4.20).

5. Conflicting Testimony.

You may find inconsistencies *within* the testimony of a single witness, or conflicts *between* the testimony of several witnesses. Conflicts or inconsistencies do not necessarily mean that a witness intentionally lied. Sometimes two or more persons witnessing the same incident see, hear, or remember it differently. Sometimes a witness remembers incorrectly or forgets. If the testimony of a witness seems inconsistent within itself, or if the testimony given by several witnesses conflicts, you should try to *reconcile* the differences. If you cannot reconcile the differences, you must then decide which testimony, if any, you believe. (Standard Civil Jury Instruction 4.30).

6. Expert Testimony – During the trial you have heard testimony from both *fact* witnesses and *expert* witnesses.

To assist juries in deciding cases such as this one involving technical or specialized knowledge beyond that possessed by a layperson, the law allows an expert witness with special knowledge, skills, experience, training or education (Pa.R.E. No. 702) to present *opinion* testimony.

An expert witness gives his or her *opinion*, to a reasonable degree of professional certainty, based upon the assumption of certain facts. You do not have to accept an expert's opinion just because he or she is considered an expert in his or her field.

In evaluating an expert witness's testimony, and/or in resolving any conflicting expert witness's testimony, you should consider the following:

- the witness's knowledge, skill, experience, training, or education, and
- whether you find that the facts the witness relied upon in reaching his/her opinion are accurate, and
- all the believability factors I have previously given to you.

(Standard Civil Jury Instruction 4.80).

7. Weighing Conflicting Expert Testimony.

In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and reliability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it is based. (Standard Civil Jury Instruction 9.100).

8. Adverse Inference.

Tim Curley, former Penn State Athletic Director, and Gary Schultz, former Penn State Senior Vice President – Finance and Business, refused to answer certain questions on the ground that their answers may tend to incriminate them. Those witnesses have a constitutional right to remain silent and decline to answer on the ground that an answer may tend to incriminate him. However, their refusal to answer those questions is relevant and admissible in a civil case. Bailets v. Pennsylvania Turnpike Comm'n, 123 A.3d 300, 310, n. 7 (Pa.Cmwlt. 2015). Therefore, you may, but need not, conclude that the answers that they would have given would have been adverse to Defendant, Penn State's interests. Rad Servs., Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 277 (3d Cir. 1986);

9. Defamation.

A communication is any act by which a person or entity brings an idea to another's attention. A communication may be made by speaking or by writing words or by another act or combination of acts that result in bringing an idea to another's attention.

A communication is defamatory if any portion of it tends to so harm the reputation of that person as to lower him in the estimation of the community or deter third persons from associating or dealing with him. A communication that states or implies that a person has acted in a way that would be inconsistent with the proper, honest and lawful performance of his job or profession, or has a character that would make him unfit to properly, honestly and lawfully perform his job or profession, is defamatory. A communication that implies a person has committed a crime is defamatory.

In deciding whether the Statement from President Spanier posted on Penn State Live on November 5, 2011 was defamatory, you should consider the message the statement would send to the average people who could have been expected to receive it. This means you should consider the innuendos and implications of what was said, as well as the inferences the recipients would have drawn from what may not have been said. You should also consider the context in which the allegedly defamatory statement was made.

It is not necessary that the defamatory statement be the primary focus of the communication in order for the Plaintiff to succeed on his claim. The Plaintiff may recover on the basis of even a small portion of the

communication, if it is defamatory. A communication, or any portion of it is defamatory, if in context, its stated or implied meaning is defamatory.

A communication is published when it is communicated by someone other than the person to whom it refers. (Standard Civil Jury Instruction 17.100).

It is not necessary for the Plaintiff to be specifically identified by name or official position for the communication to defame him. The Plaintiff may be defamed if the Defendant intended the communication to refer to the Plaintiff, or if a description or circumstances tend to identify him. (Cosgrove Studio and Camera Shop, Inc. v. Pane, 182 A.2d 751, 753 (Pa. 1962)). The Plaintiff also may be defamed where a recipient of the communication is familiar with the circumstances mentioned in the communication and recognizes that it concerns the Plaintiff. The burden is on the Plaintiff to show that a description or reference in the communication, or familiarity with the circumstances, would lead the recipients of the communication to reasonably understand that it is referring to the Plaintiff. (Standard Jury Instruction 17.120).

A communication may be false either because it contains untrue or incomplete statements of fact or because its implication is untrue.

It is presumed that a defamatory statement that does not involve a matter of public concern or was published by a person or entity who was not a member of the media is false. The burden is on the Defendant to overcome this presumption. That means the burden is on Penn State to prove, by a fair

preponderance of the evidence, that the communication was true. (Standard Civil Jury Instruction 17.130).

10. Defamation Damages.

The Plaintiff is entitled to be fairly and adequately compensated for all harm he suffered as a result of any false and defamatory communications published by Penn State, or its employees.

The Plaintiff claims that the Statement from President Spanier posted on Penn State Live on November 5, 2011, defamed him. In reviewing the statement from President Spanier, in context, you need to determine if that communication, or any portion of it, implied that Mr. McQueary acted dishonestly or may have committed a crime.

You may deduce that, if the Statement claims that charges against Messrs. Curley and Schultz for perjury in their Grand Jury testimony were groundless, then the statement implies that the Plaintiff's testimony upon which those criminal charges were based was untruthful. And if Mr. McQueary's testimony was untruthful, not only would that tend to blacken his reputation, but it would subject Mr. McQueary to criminal liability for perjury. (pp. 3-4, Slip Opinion, (dismissing Preliminary Objections)).

11. Punitive Damages.

Under certain circumstances, the law authorizes the award of punitive damages to punish a defendant's outrageous conduct and to deter a defendant and others from engaging in similar acts in the future. Conduct is outrageous when it is malicious, wanton, willful, oppressive or shows reckless disregard to the interest of others.

Generally, punitive damages may be awarded against an employer if the actions of its employees, agent or agents were:

First, outrageous;

Second, occurred during and within the scope of the agent's or employee's duties; and

Third, were not committed to satisfy the employee's personal ill will or malice, but instead were committed with the intent to further Penn State's interests. (Standard Jury Instruction 8.10).

However, in a defamation case, there is an additional requirement that the defamation statement be made with legal malice.

If you find that the Defendant acted with legal malice in publishing false and defamatory communications, you may presume that the Plaintiff suffered both injury to his reputation and the emotional distress, mental anguish and humiliation that would result from such communication. This means that you need not have proof that the Plaintiff suffered emotional distress, mental anguish and humiliation in order to award him damages for such harm because such harm is presumed by the law when a defendant

publishes a false and defamatory communication with malice. (Joseph v. Scranton Times, L.P., 129 A.3d 404, 430-471 (Pa. 2015).

Legal malice requires, at a minimum, that a statement was made with reckless disregard for the truth or purposeful avoidance of the truth. Id., quoting Harte-Hanks Communications Inc. v. Connaughton, 491 U.S. 657, 692-693, 109 S.Ct. 2678, 2698 (1989). In considering whether defendant acted with reckless disregard to the truth or in purposeful avoidance of the truth, you may consider:

1. evidence that the “defendant had obvious reasons to doubt the veracity” of its own statement (St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326 (1968));

2. evidence that the defendant published its statement without further investigation or corroboration, where the allegations were clearly serious enough to warrant some attempt at substantiation. Curran v. Philadelphia Newspapers, Inc., 376 Pa.Super. 508, 513-14, 546 A.2d 639, 642 (1988), Stickney v. Chester County Communications, Ltd., 361 Pa.Super. 166, 522 A.2d 66 (1987);

3. evidence of the absence of any factual basis to support the statement. Curran v. Philadelphia Newspapers, Inc., 376 Pa.Super. 508, 514, 546 A.2d 639, 642 (1988). See also Frisk v. News Company, 361 Pa.Super. 536, 523 A.2d 347 (1986) See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 158, 87 S.Ct. 1975, 1993 (1967).

Therefore, if you determine that the statement from President Spanier was published with reckless disregard for the truth or in purposeful avoidance of the truth, then you may presume that the Plaintiff suffered emotional distress, mental anguish and humiliation, and award him damages for such.

In determining the amount of such an award of such presumed injury to the Plaintiff's reputation and suffering of emotional distress, mental anguish and humiliation by the Plaintiff, you may consider the character and previous general standing and reputation of the Plaintiff in his community. You may also consider the character of the defamatory communication that the Defendant published, its area of dissemination, and the extent and duration of the publication. You may also consider what probable effect the Defendant's conduct had on the Plaintiff's profession, and the harm that may have been sustained by the Plaintiff as a result of that conduct. (Standard Civil Jury Instruction 17.180).

If you decide that Mr. McQueary is entitled to an award of punitive damages, it is your job to fix the amount of such damages. In so doing, you may consider any or all of the following facts:

1. The character of Defendant's act;
2. The nature and extent of the harm to the Plaintiff that Defendant caused, or intended to cause. In this regard you may include the Plaintiff's trouble and expense in seeking to protect his interests in legal proceedings and in this suit;

3. The wealth of Penn State insofar as it is relevant in fixing the amount that will punish Penn State and deter Penn State and others from engaging in like conduct in the future.

The amount of punitive damages awarded must not be the result of passion or prejudice against Penn State on the part of the jury. The sole purpose of punitive damages is to punish the Defendant's outrageous conduct and to deter the Defendant and others from similar acts. (Standard Civil Jury Instruction 8.20).

However, “compensatory damages that may be awarded without proof of pecuniary loss include compensation for (b) emotional distress.” (Little v. York County Earned Income Tax Bureau, 333 Pa.Super. 8, 21-22, 481 A.2d 1194, 1201 (Pa.Super. 1984), quoting Restatement of Torts, 2d §905(b)).

The legal standard for awarding punitive damages for a misrepresentation is somewhat different than the legal standard for awarding punitive damages in a defamation case.

You may also award punitive damages against Penn State if you feel that the action of Messrs. Curley and Schultz in misrepresenting their intention to Mr. McQueary was:

First – outrageous

Second – occurred during and within the scope of their duties; and

Third – were not committed to satisfy Curley and/or Schultz’s personal ill will or malice toward Mr. McQueary but were committed with the intent to further Penn State’s interests. (Standard Civil Jury Instruction 8.10).

If you decide that the Plaintiff is entitled to an award of punitive damages because of Messrs. Curley and Schultz’s misrepresentation, it is your job to fix the amount of such punitive damages. In doing so, you may consider any or all of the following factors:

1. The character of the Defendant’s act;

2. The nature and extent of the harm to the Plaintiff that the Defendant caused. In this regard you may include the Plaintiff’s trouble and expense in seeking to protect his interests in legal proceedings and in this suit;

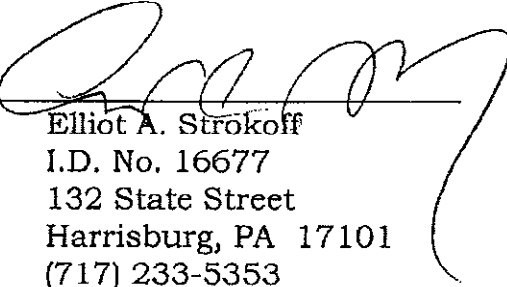
3. The wealth of the Defendant insofar as it is relevant in fixing an amount that will punish it, and deter it and others from like conduct in the future.

It is not necessary that you award compensatory damages to the Plaintiff for misrepresentation in order to assess punitive damages against the Defendant, as long as you find in favor of the Plaintiff and against the Defendant on the question of liability. (Standard Civil Jury Instruction 8.20).

Respectfully submitted,

STROKOFF & COWDEN, P.C.

By



Elliot A. Strokoff
I.D. No. 16677
132 State Street
Harrisburg, PA 17101
(717) 233-5353

DATE: 9/29/16