ORIGINAL

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

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

___Medical Professional Liability Action (check if applicable)

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

Filed on Behalf of:
Defendant, The Pennsylvania State University

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REPLY BRIEF IN FURTHER SUPPORT OF DEFINITIVE MOTION FOR POST-TRIAL RELIEF

Defendant The Pennsylvania State University submits this reply brief in further support of its Definitive Motion for Post-Trial Relief, filed April 10, 2017. This reply addresses only certain arguments in Plaintiff's opposition brief, filed June 9, 2017 ("Pl. Br."). The University also refers to the brief that it filed on May 10, 2017 ("Def. Br.").

ARGUMENT

I. Plaintiff failed to establish that the University violated the Whistleblower Law.

Plaintiff does not dispute the standard for proving a violation of the Whistleblower Law. *See* Pl. Br. at 3-5; Def. Br. at 13. The Whistleblower Law "envisions a shifting burden of proof." *Golaschevsky v. Commonwealth*, 720 A.2d 757, 760 (Pa. 1998) (Nigro, J., concurring). "An employee is obligated to show that he reported wrongdoing before being subjected to adverse action." *Id.* "The burden then shifts to the employer to establish that there was a legitimate reason for the adverse action." *Id.* "Once the employer offers such evidence, *the burden shifts back to the employee to show that this reason was merely pretextual*." *Id.* (emphasis added).

Plaintiff's argument that the University "ignores" the Supreme Court's decision in *O'Rourke v. Commonwealth*, 778 A.2d 1194 (Pa. 2001) is unavailing. *See* Pl. Br. at 4. First, *O'Rourke* approvingly cited the burden-shifting scheme

described by Justice Nigro in his concurring opinion in *Golaschevsky*. *See O'Rourke*, 778 A.2d at 1200. Second, although the Supreme Court held in *O'Rourke* that the reasons the plaintiff in that case was dismissed were not separate from his report of wrongdoing, the facts in *O'Rourke* are distinguishable from the facts here. In *O'Rourke*, the plaintiff was a food service instructor at a state prison who submitted a report that prisoners, with the knowledge of certain prison staff, were stealing food. *Id.* at 1196. After he submitted his report, he began to experience a hostile work environment, his assignments were modified, and he was removed from a list of employees eligible to work as supervisors. *Id.* at 1197.

The Supreme Court accepted the Commonwealth Court's findings that the plaintiff's reassignment of duties was done for a legitimate reason – to reduce conflict in the department – but that they were nonetheless not "separate" from his report of wrongdoing because "it is undisputed that Appellees would not have removed O'Rourke from the acting supervisor list or moved him to the food service line in the dining hall had O'Rourke not filed his good faith report of wrongdoing." *Id.* at 1205.

Unlike *O'Rourke*, the decision to place McQueary on administrative leave, and not renew his appointment, was not a "direct result of [McQueary's] report." *Id.* To the contrary, over ten years separated McQueary's initial report of wrongdoing from his placement on administrative leave. Instead, the direct cause

of McQueary's placement on administrative leave was the numerous threats directed at him and the University, and the direct cause of the nonrenewal of his appointment was that the new head coach had no position for him on the incoming coaching staff.

II. The damages awarded by the Court on the Whistleblower Law claim duplicated the damages awarded by the jury on the defamation and misrepresentation claims.

Plaintiff claims that the jury must not have awarded damages that duplicated damages for the Whistleblower Law claim because the Court responded "[n]o" when the jury asked if it could "consider placement of McQueary on paid administrative leave and banishment from Penn State University football facilities under the realm of defamation[.]" Pl. Br. at 5. However, this ignores that the facts underlying the Whistleblower Law claim and the defamation and misrepresentation claims significantly overlap. The Court's response to this isolated question from the jury did not eliminate the risk of duplicative damages.

The Court's charge to the jury illustrates how the jury likely awarded damages for the same injury that the Court did on the Whistleblower Law claim. The jury was instructed that in awarding damages it could consider "the probable effect of the defendant's conduct . . . on the plaintiff's profession and the harm that he may have sustained in that profession as a result of the conduct of the [U]niversity." N.T. (10/27/16) at 141:23-142:2 (defamation), 152:24-25 (for

misrepresentation "the damages analysis essentially is the same."). Those were the same injuries at issue in the Whistleblower Law claim.

III. Actual damages under the Whistleblower Law do not include non-economic damages.

Plaintiff claims that the University ignores Plaintiff's "significant precedent that the term actual damages connotes compensatory damages which include mental suffering." Opp. Br. at 9. However, the authority Plaintiff cites is inapposite. *Sites v. Nationstar Mortg., LLC*, 646 F. Supp. 2d 699 (M.D. Pa. 2009) had nothing to do with the Whistleblower Law. It held that even nominal damages are a sufficient basis for a fraud claim. *Id.* at 713-14. Similarly, *Weider v. Hoffman*, 238 F. Supp. 437 (M.D. Pa. 1965) did not involve the Whistleblower Law, and considered whether punitive damages were properly awarded where there were no actual damages in a libel action. *Rankin v. City of Philadelphia*, 963 F. Supp. 463 (E.D. Pa. 1997) considered whether punitive damages are included within "actual damages." It did not consider whether actual damages include non-economic compensatory damages. *Id.* at 478. *Palazzolo v. Damsker*, No. 10-CV-7430, 2011 WL 2601536 (E.D. Pa. June 30, 2011) considered the same issue, holding that punitive damages are not recoverable under the Whistleblower Law. *See id.* at *9-10.

Plaintiff's observation that the University cited *Joseph v. Scranton Times, LP*, 129 A.3d 404, 429 (Pa. 2015) in its proposed findings of fact and conclusions

of law is unavailing. *See* Pl. Br. at 8. The University cited *Joseph* for the proposition that "all awards must be supported by competent evidence concerning the injury." That proposition is correct, and it bars Plaintiff's recovery here. Besides the fact that they are not recoverable under the Whistleblower Law, the non-economic damages that Plaintiff seeks were not supported by sufficient competent evidence. The University is not bound by every statement in an opinion that it cites for another proposition, and Plaintiff cites no authority to the contrary.

IV. The Court erred in denying Defendant's motion to stay.

Plaintiff complains that even though the University indemnified Curley and Schultz for their legal expenses, it "never bothered to approach either of them, or their attorneys, to obtain information" relevant to this case. Pl. Br. at 10. Plaintiff does not deny that Curley and Schultz asserted their Fifth Amendment rights and enjoyed attorney-client privilege in their communications with their criminal defense counsel. It would have been inappropriate for the University to use its indemnification of Curley and Schultz to coerce them into not asserting that right and privilege. *See* Pa. R. Prof'l Conduct 1.8(f) (providing that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."); Pa. R. Prof'l Conduct 4.2 (no contact rule).

Plaintiff also asserts, without citation to any specific testimony, that Curley and Schultz's testimony would have been more damaging to the University at trial than the adverse inference instruction that was given. *See* Pl. Br. at 10. But that ignores that the assertion by Curley and Schultz of their Fifth Amendment right prevented the University from taking discovery of them and engaging in its own questioning of them at trial. In refusing the University's motion for a stay, the Court deprived the University of the opportunity to develop evidence from Curley and Schultz as it saw fit to do in this case.

V. Any statements of Curley, Schultz, and Spanier regarding the mandated reporter law are not binding on the University.

Plaintiff claims that statements made by Curley and Schultz at their guilty plea allocutions establish that they were mandated reporters. Pl. Br. at 16-17. Plaintiff is wrong, first, because the statements by Curley and Schultz do not constitute admissions. The question posed to Schultz was whether he understood the elements of the crime that he was charged with. Pl. Br. at 17. The question posed to Curley was whether he understood the evidence that would be presented against him if he did not plead guilty. *Id.* These do not constitute admissions about the proper interpretation of 23 Pa.C.S. § 6311. *See John B. Conomos, Inc. v. Sun Co., Inc.*, 831 A.2d 696, 713 (Pa. Super. 2003) ("An admission is not conclusively biding when the statement is indeterminate, inconsistent, or ambiguous.")

Moreover, the personal understanding of Curley and Schultz of the mandated reporting law does not bind the University. "[T]he strict construction of the vicarious admission exception [to the hearsay rule] in this Commonwealth requires that for a statement to be admissible, the offering party must show that the declarant was an agent of the party against whom the admission was offered, and that he had the authority to speak for that party." *Durkin v. Equine Clinics, Inc.*, 546 A.2d 665, 672-73 (Pa. Super. 1988) (emphasis omitted). Curley and Schultz did not have authority to speak for the University at the time of their allocutions, and they never had authority to bind the University to particular interpretations of Pennsylvania law. Further, their statements do not constitute binding admissions because they are statements of law rather than statements of fact. "Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *John B. Conomos, Inc.*, 831 A.2d at 713.

Plaintiff also cites Spanier's comment in an email that "we become vulnerable for not having reported it." Pl. Br. at 17-18. That statement does not constitute an admission for the same reasons that Curley and Schultz's statements at their allocutions do not. Further, Spanier's statement is ambiguous. It says nothing about the interpretation of Pennsylvania law, and the statement does not indicate that he was concerned that any vulnerability would arise from

noncompliance with the mandatory reporter law, as opposed to professional or public relations consequences.

VI. The University did not waive its argument that the misrepresentation claim was barred by the statute of limitations.

Plaintiff's reliance on *Bruzzese v. Bruzzese*, No. 1056 WDA 2014, 2015 WL 7100724 (Pa. Super. 2015) to argue that the University waived its statute of limitations defense is unavailing. First, *Bruzzese* is an unpublished opinion of the Superior Court, has no precedential value, and its citation by the Plaintiff is improper. *See* 210 Pa. Code § 65.37; *Schaaf v. Kaufman*, 850 A.2d 655, 661 (Pa. Super. 2004). Further, the Superior Court has ruled that failure to assert a statute of limitations defense at trial does not constitute a waiver. *See Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375, 1378-79 (Pa. Super. 1995).

Plaintiff's argument is contradictory to Supreme Court precedent. *See Connor v. Allegheny General Hospital*, 461 A.2d 600, 603 n.3 (Pa. 1983). If Plaintiff did not understand the averment in the University's New Matter, it "could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the University's] complaint."

CONCLUSION

For the reasons stated above and those stated in the University's Brief in Support of its Definitive Motion for Post-Trial Relief, the University respectfully requests that the Court grant judgment notwithstanding the verdict in favor of the University or grant a new trial, remit improperly awarded damages, or mold damages consistent with the evidence.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 23rd day of June 2017, a true and correct copy of the REPLY BRIEF IN FURTHER SUPPORT OF DEFINITIVE MOTION FOR POST-TRIAL RELIEF was served upon the following persons via pre-paid FedEx overnight delivery:

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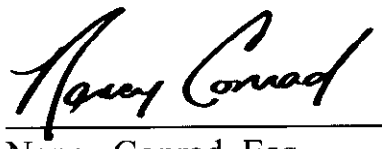
By: 

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