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 in Further Support of Motion for Post-Trial Relief

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
Nancy Conrad, Esquire
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
(610) 782-4909
conradn@whiteandwilliams.com
PA I.D. Number 56157

REPLY IN FURTHER SUPPORT OF MOTION FOR POST-TRIAL RELIEF

PRELIMINARY STATEMENT

As detailed in the University's Brief supporting the Motion for Post-Trial Relief, the evidence at trial failed to establish that the University defamed McQueary or made any misrepresentations to McQueary. Plaintiff's responsive Memorandum of Law fails to support the propriety of the errors raised in the Post-Trial Motion. The University now submits this reply to address some of the failings of McQueary's Response and respectfully requests that this Honorable Court grant post-trial relief in the form of judgment notwithstanding the verdict or, alternatively, a new trial or remittance of improper awards.

ANALYSIS

I. THE RECORD AT TRIAL DID NOT SHOW THAT CURLEY, SCHULTZ, OR SPANIER WERE MANDATED REPORTERS UNDER THE 2001 VERSION OF THE CHILD PROTECTIVE SERVICES LAW

A. THE JURY SHOULD NOT HAVE CONSIDERED WHETHER UNIVERSITY OFFICIALS WERE MANDATED REPORTERS, BECAUSE MCQUEARY DID NOT PLEAD THAT AS A BASIS FOR ANY CLAIM AND THE TRIAL RECORD FAILED TO SUPPORT THAT FINDING

It is important to reiterate that the Court injected into this litigation the question of whether Curley, Schultz, or Spanier were mandated reporters.

McQueary never pleaded or argued that his misrepresentation claim was based on the status of University officials as mandated reporters.

Pennsylvania is a fact-pleading state. E.g., Lerner v. Lerner, 954 A.2d 1229, 1235 (Pa. Super. 2008). A complaint must give the defendant notice of the basis of the plaintiff's claim so as to "enable the adverse party to prepare his case." McShea v. City of Phila., 995 A.2d 334, 339 (Pa. 2010) (quoting Landau v. Western Pennsylvania National Bank, 282 A.2d 335, 339 (Pa. 1971)). That was not done here. In essence, McQueary's Complaint was rewritten at trial to bolster his claims. The University was disadvantaged because it could not adequately prepare a defense to the mandated reporter status and the record is not as developed as it would have been if notice was provided. N.T. (10/27/16) at 9:6-18. This disadvantage was exacerbated because two University officials who the Court identified as mandated reporters invoked their Fifth Amendment rights not to testify.

In his Reply, McQueary attempts to fill the void by making unsupported and unpled assertions that purportedly demonstrate that Spanier, Curley, and Schultz met some of the mandated reporter requirements. For example, he alleges without record support that Spanier, Curley, and Schultz had regular contact with minors as part of their profession. McQueary also asserts for the first time that Schultz, the vice-president for finance and business, was a mandated reporter due to his status

as a law enforcement official. McQueary points to nothing more than his overseer role of the University police department. McQueary never pleaded or introduced any evidence that Schultz was responsible for actual policing.

Another new argument proffered by McQueary is that the mandated reporter instruction was proper because Schultz, Spanier, or Curley failed to meet their reporting obligation under the Clery Act. Since violations of the Clery Act were neither pleaded nor litigated, the record does not support the notion that Schultz, Spanier, or Curley had a reporting obligation under the Clery Act or that such a reporting obligation was relevant to McQueary's claims.[1]

Importantly, even while trying to fill the void with unpled and unsupported allegations, McQueary never attempts to demonstrate that the child he saw with Sandusky ever came before Spanier, Schultz, or Curley. 23 Pa.C.S. §§6311(A) (2001). Even if McQueary could point to record evidence that Spanier, Schultz, or Curley met every other requirement to confer mandated reporter status (which he did not), this failure of the record to support this element is fatal to his support of the Court's jury instruction.

---

[1] McQueary also alleges for the first time that Spanier was required to report as a "person in charge." 23 Pa. C.S. § 6311(c) (2001). However, a necessary prerequisite to invoking a duty to report under this provision is that a ***mandated reporter*** went to the "person in charge" with suspicions of abuse. Id. For all the reasons stated here and in the principal brief, the trial record fails to support that Curley or Schultz was a mandated reporter.

Because this mandated reporter issue was not pleaded by McQueary, it should not have been a basis for the jury to find liability. If the University had notice of this claim, it could have prepared to defeat the notion that Curley, Schultz, and Spanier were mandated reporters. Rather, the University was ambushed when this issue was first raised by the Court when denying the University's request for compulsory non-suit. N.T. (10/25/2016 (A.M.) at 67:25-69:2.

Further, since the issue was injected into trial by the Court, the record is undeveloped and does not support the conclusion that Curley, Schultz, or Spanier was a mandated reporter. Since the purported mandated reporter status was the lone plausible basis for finding liability for intentional misrepresentation or defamation, entry of judgment notwithstanding the verdict is appropriate. Alternatively, the Court should order a new trial.

B. THE UNIVERSITY WAS SEVERELY PREJUDICED BY THE COURT'S MANDATED REPORTER INSTRUCTION

McQueary also alleges that even if the mandated reporter instruction was in error, that error was harmless. McQueary has failed to make that showing.

To support his position, McQueary purports to focus the court on the representation that Curley and Schultz would "see that it was properly investigated." Complaint (Ex. B) at ¶ 60. According to McQueary, it was not

investigated at all. (Reply at p. 5). This representation was the "gravamen" of the misrepresentation claim according to McQueary. (Reply at p. 4). He plucks the following evidence from the record to support the misrepresentation: (1) Outside General Counsel advised Schultz to report the matter to the Department of Public Welfare; (2) Schultz checked with the Police Chief regarding the 1998 investigation into Sandusky; and (3) Spanier discussed their vulnerability for not reporting McQueary's observations.

The second piece of evidence relied upon by McQueary undercuts his argument that no investigation occurred. Without the mandated reported instruction, the jury could have reasonably concluded that Curley and Schultz conducted an investigation since such an investigation would include review of prior similar allegations.

As to the other evidence raised by McQueary, they do not concern whether the University conducted a proper investigation. That evidence concerns whether Curley and Schultz took appropriate action, another basis for the misrepresentation claim. This distinction is important. The University asserts that McQueary cannot demonstrate a misrepresentation because Curley and Schultz, according to McQueary, told him exactly what action they were going to take and that did not include reporting McQueary's observations to law enforcement or child welfare authorities. Accordingly, Curley and Schultz did not make any misrepresentation

about their intent to have an outside agency review Sandusky's conduct in light of their investigation.

The fact that outside General Counsel advised Schultz to report McQueary's observations to the Department of Public Welfare does not implicate whether Curley and Schultz conducted a proper investigation. Rather, it concerns what steps they took in response to their own investigation. Similarly, the email among Spanier, Curley, and Schultz concerns what actions they were going to take, the email did not concern the investigation.

Without the erroneous mandated reporter instruction, McQueary could not show that the University was liable for any misrepresentation by Curley and Schultz that they would report McQueary's observations to an outside authority. The University never alleged that they would do so. As such, the mandated reporter instruction was prejudicial and for reasons stated in the principal brief tainted the entire trial.

II. MCQUEARY DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE EACH AND EVERY ELEMENT OF INTENTIONAL MISREPRESENTATION

A. MCQUEARY DID NOT SHOW AN ACTIONABLE MISREPRESENTATION

As stated above, McQueary appears to focus on the misrepresentation verdict being predicated solely on the representation that the University conducted a proper investigation. This is not so. If the University had conducted no

investigation, but took action by reporting McQueary's observations to law enforcement or a child welfare agency, McQueary's logic suggests that he would have suffered no damage to his career prospects and reputation. However, as detailed above, McQueary could not and did not show by any standard, let alone a clear and convincing standard, that the University misrepresented the actions it would take.

B. MCQUEARY DID NOT JUSTIFIABLY RELY ON THE REPRESENTATIONS MADE BY UNIVERSITY OFFICIALS

McQueary argues that his reliance was justifiable because from a "layperson's standpoint, a proper investigation . . . could have resulted in a law enforcement decision of not enough evidence to prosecute. . . ." (Reply Brief at p. 7). This statement is not germane, as McQueary suggests, to whether Curley and Schultz misrepresented that a proper investigation occurred. This matter concerns what actions were taken by the University. According to McQueary, Curley and Schultz never told him that they were going to turn the investigation over to the police. The University should not be liable under a clear and convincing standard when McQueary asserts he justifiably relied on something he was never told would happen by Curley and Schultz.

C. THE UNIVERSITY DID NOT WAIVE ITS DEFENSE THAT THE STATUTE OF LIMITATION LAPSED

McQueary alleges that the University waived its statute of limitations defense because it was not included in their points for charge. McQueary provides no support for this position. In fact, whether a complaint is timely filed within the limitations period is a matter of law for the Court to decide, not the jury. E.g., Sevast v. Kakouras (Appeal of Sunday), 915 A.2d 1147, 1153 (Pa. 2007).

McQueary unreasonably asserts that the running of the statute of limitations was tolled because he did not know that no investigation occurred until 2012. McQueary never testified that during the decade that passed that he was approached by law enforcement or child welfare services. Any reasonable witness of suspected child abuse would expect law enforcement or child welfare services to question him or her after reporting suspected abuse. He then worked on campus for that decade and never testified that he asked Paterno, Curley, Spanier, or Schultz about the status of any additional investigation or why such an investigation never occurred. The record only supports that McQueary practiced willful ignorance when it comes to whether the University referred the matter to another agency for investigation. Willful ignorance can never be the basis for

extending statute of limitations.[2] E.g., Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995).

III. MCQUEARY DID NOT SHOW AN ADDITIONAL QUANTUM OF MALICIOUS CONDUCT BY THE UNIVERSITY TO SUPPORT AN AWARD OF PUNITIVE DAMAGES

In his Reply, McQueary concludes his section on punitive damages by noting that "it is common sense that lying that a proper investigation would be performed to a good faith reporter of sexual abuses of a minor is outrageous." (Reply at p. 15). This conclusion was supposed to support the jury's award of punitive damages. But McQueary falls into the same trap that the University sought to avoid by having the Court explicitly instruct the jury that more than an intentional tort is required to support a punitive damage claim. The misrepresentation is not enough under Pennsylvania law to support a claim for punitive damages. There must be something more that the "fraud which is the basis for the recovery of compensatory damages." Smith v. Renault, 564 A.2d 188, 193-194 (Pa. Super. 1989). McQueary has not identified that something more.

[2] Similarly, if McQueary mistakenly believed that Curley and Schultz represented that an outside agency would conduct the investigation rather than Curley and Schultz that also would not be a basis for extending the statute of limitations. "It is well settled that the statute of limitations is not tolled by mistake or misunderstanding." See Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995).

Rather, McQueary states there was "overwhelming evidence on the record that the actions of Mssrs. Curley and Schultz in intentionally misrepresenting to Mr. McQueary that a proper investigation would occur was [sic] outrageous." (Reply Brief at p. 15). McQueary points to no evidence that supports the position that University officials acted with ill will or malice towards McQueary when they spoke with him. None exists. Accordingly, the Court should vacate the award of punitive damages.

IV. MCQUEARY FAILS TO CITE ANY BINDING AUTHORITY THAT SUPPORTS THE COURT'S DECISION TO ISSUE AN ADVERSE INFERENCE INSTRUCTION BECAUSE CURLEY AND SCHULTZ INVOKED THE FIFTH AMENDMENT

McQueary is critical of the University for relying on "missing witness" precedent to support his position that this Court incorrectly instructed the jury that it could take an adverse inference against the University because Curley and Schultz invoked their protections under the Fifth Amendment. While the University understands that these cases did not concern invocations of the Fifth Amendment, it sees no material distinction between the factual situations presented there and the situation faced here. In both cases, the parties had equal access or lack of access to the missing witnesses. McQueary provided no basis to distinguish those cases, which refused to issue an adverse event instruction.

McQueary is also critical of the University for "cit[ing] inapposite non-Pennsylvania state court precedent to support its argument." (Reply at p. 18). Yet, McQueary provides no Pennsylvania state binding precedent in support of his Reply. McQueary claims the University should have cited Baxter v. Palmigiano, 425 U.S. 308 (1976), which McQueary believes supports his position. But the University did mention the holding in Baxter (Principal Brief at p. 68). Second, Baxter is distinguishable because it concerns the situation of a party to a civil suit taking the Fifth Amendment and not a non-party. See Baxter v. Palmigiano, 425 U.S. 308, 318 (U.S. 1976).

Plaintiff also points to Bailets v. Pa. Turnpike Comm'n, 123 A.3d 300 (Pa. 2015) to support his position. But in Bailets, the Supreme Court explicitly found that it was unnecessary to consider that issue. Id. at 309 n. 7. Any commentary by the Court is non-binding *dicta*. As stated in the principal brief and recognized in the Subcommittee notes in the Standard Civil Jury Instructions, no Pennsylvania state case has considered when a Court should issue an adverse inference instruction due to a non-party taking the Fifth Amendment. See Pa. SSJI 5.5.1 *Note* ("Neither the Supreme Court of the United States nor the Pennsylvania appellate courts have addressed the consequences of a nonparty invoking the Fifth Amendment in a civil case.").

The final case relied upon by McQueary is RAD Services v. Aetma Cas. & Sur. Co., 808 F.2d 271, 275 (3d Cir. 1986). Unlike the other opinions cited by McQueary, RAD Services did approve an adverse inference instruction against a party for a non-party's invocation of the Fifth Amendment. In the over thirty years since this Opinion was issued, no Pennsylvania Court has cited it as persuasive authority to apply an adverse instruction in the situation presented here. Furthermore, the balancing test set forth in Coquina Investments v. TD Bank, 760 F.3d 1300, 1309-1312 (11th Cir. 2014) is more aligned with Pennsylvania law. Indeed, the Subcommittee Note to the Pennsylvania Standard Civil Jury Instructions cites to the Coquina balancing test with approval. See Pa. SSJI 5.5.1 *Note*.

RELIEF REQUESTED

For the foregoing reasons, and those stated in the University's Motion for Post-Trial Relief and the supporting brief, the University's Motion for Post-Trial Relief should be granted. The University respectfully requests that the Court grant judgment notwithstanding the verdict in favor of the University or grant a new trial, or remit improperly awarded damages.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: 

Nancy Conrad, Esq.
Attorney PA I.D. No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University

Dated: March 29, 2017

WHITE AND WILLIAMS LLP
Nancy Conrad, Esquire
Identification No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

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

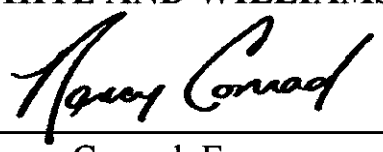
I, Nancy Conrad, Esquire, hereby certify that on this 29th day of March 2017, a true and correct copy of the REPLY IN FURTHER SUPPORT OF THE UNIVERSITY'S MOTION FOR POST-TRIAL RELIEF was served upon the following persons via pre-paid FedEx overnight delivery:

Honorable Thomas G. Gavin
Justice Center, Courtroom 7
201 West Market Street
West Chester, Pennsylvania 19380-0989
Judge

Elliot A. Strokoff, Esquire
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
Counsel for Plaintiff

William T. Fleming, Esquire
Fleming Law Offices
111 Sowers Street, Suite 330
State College, PA 16801
Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By: 

Nancy Conrad, Esq.