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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 to Plaintiff's Response to Defendant, The Pennsylvania State University's Preliminary Objections to Plaintiff's Complaint

Filed on Behalf of:
Defendant, The Pennsylvania State University

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

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Defendant, The Pennsylvania State University (hereinafter, the "University"), by and through its counsel, White and Williams LLP, hereby files and serves this Reply to Plaintiff's Response to Defendant's Preliminary Objections to Plaintiff's Complaint. All arguments in Plaintiff's Response fail. The University particularly responds to Plaintiff's guised attempt to force a defamatory meaning on Spanier's statements by ignoring the full content of the

statements. The University further responds to Plaintiff's citation of factually distinguishable and/or legally inapposite cases to support his position that the misrepresentation claim should not be dismissed. Contrary to Plaintiff's bald positions, however, the defamation and misrepresentation claims fail as a matter of law and should be dismissed with prejudice.[1]

I. ARGUMENT

A. PLAINTIFF MISCONSTRUES SPANIER'S STATEMENTS AND FAILS TO ASSERT A VIABLE DEFAMATION CLAIM.

Plaintiff argues that Spanier's statements are subject to both a "plausible innocent interpretation" and "an alternative defamatory interpretation." Plaintiff's Brief in Opposition, at 3. Plaintiff's argument fails for multiple reasons.

First and foremost, Plaintiff misconstrues Spanier's statements. To this end, Plaintiff relies on an isolated phrase from Spanier's written statement that was published on *Penn State Live* — *i.e.* "that 'these charges are groundless'" — in a guised attempt to force a defamatory interpretation of the statement. See Plaintiff's Brief in Opposition, at 5. While Plaintiff asserts a position based on the full "context" of occurrences, he concomitantly ignores the plain content of the statement itself. See Plaintiff's Brief in Opposition, at 3-9

More specifically, and according to the Complaint, Spanier issued the following excerpted statement on *Penn State Live* regarding the charges filed

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[1] Plaintiff's claim for punitive damages should similarly be dismissed with prejudice. See Memorandum of Law in Support of Preliminary Objections, at 30-32.

against Curley and Schultz: "I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately." See Complaint, at Exhibit "B" (emphasis added). A plain reading of the statement reveals that Spanier conveyed a mere opinion that the record would show that the charges were groundless — not that the charges were in fact groundless. As previously addressed, an opinion cannot legally support a defamation claim. See Memorandum of Law in Support of Preliminary Objections, at 18, fn. 6. Accordingly, Spanier's opinion concerning the charges cannot support an innuendo that Plaintiff lied or committed perjury. See id.

Second, Plaintiff's reliance on Cosgrove Studio and Camera Shop, Inc. v. Pane, 182 A.2d 751 (Pa. 1962) is misplaced. There, a plaintiff corporation placed an advertisement in newspapers that offered customers a free roll of photographic film for each developed film roll. The next day, the defendant corporation, a competitor, published the following advertisement in the same newspapers:

> 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 752. Upon review, the Pennsylvania Supreme Court held that the defendant corporation's advertisement "clearly imputes, to the person to whom it refers, characteristics and conduct which are incompatible with the proper and lawful exercise of a business." Id., at 753. Since the words themselves were defamatory, the Court held that the plaintiff corporation pled a legally sufficient defamation claim.

Unlike Cosgrove, Spanier's statements do not expressly refer to any characteristics or conduct that violate any laws. According to the Complaint, Spanier did not expressly state that anyone, including Plaintiff, lied or committed perjury.[2] Spanier only set forth his unconditional support for Curley and Schultz and indicated that he was confident that the record would show that Curley and Schultz conducted themselves appropriately. See Complaint, at Exhibit "B."

Moreover, unlike Cosgrove, this case does not involve consecutively issued commercial advertisements in which "no extrinsic proof [is] necessary to indicate the injurious character of the communication." See Cosgrove, at 754. Here, no injurious character can be derived from the plain meaning of the statements.

[2] While Plaintiff properly asserts that falsely stating that an individual committed a crime may be defamatory *per se*, Spanier did not express that anyone committed a crime.

Third, Plaintiff fails to provide a sufficient explication in his brief or cite to sufficient facts to support his position that "[i]n order for the charges against Curley and Schultz to be groundless . . . the clear suggestion, or imputation is that Plaintiff lied when testified [sic] he had reported sexual misconduct to them." See Plaintiff's Brief in Opposition, at 7. Plaintiff's argument is based on mere speculation and lacks necessary support.

Finally, Plaintiff asserts he is not a public figure. See Plaintiff's Brief in Opposition, at 8. At the same time, however, Plaintiff maintains that Spanier's written statements, which did not reference Plaintiff in any way, caused "innumerable people," who read the statement in mainstream media, to question Plaintiff's reputation and irreparably harmed his ability to be a football coach. Under these circumstances, Plaintiff is, at a minimum, a public figure for purposes of this litigation. See Memorandum of Law In Support of Preliminary Objections, at 15 (citing Joseph v. Scranton Times L.P., 959 A.2d 322, at 339 (Pa. Super 2008)). Based on the foregoing, this Court should reject Plaintiff's arguments and dismiss Count II of the Complaint with prejudice.

B. PLAINTIFF RELIES ON DISTINGUISHABLE AND INAPPOSITE CASE LAW TO SUPPORT HIS MISREPRESENTATION CLAIM.

Plaintiff argues that the misrepresentation claim should not be dismissed at the preliminary objection stage. Plaintiff maintains, without citation to applicable legal support, that the lapse of nearly ten (10) years between the alleged

misrepresentation by Curley and Schultz and his alleged harm cannot serve to bar his claim at this stage. See Plaintiff's Brief in Opposition, at 13. Plaintiff cites three cases in support, all of which are factually and/or legally inapposite.

First, Plaintiff relies on Taylor v. Jackson, 643 A.2d 771 (Pa. Cmwlth. 1994). There, claims were asserted against state and local police relating to multiple collisions on an interstate highway. Id. The trial court held that a two (2) hour lapse of time between the alleged negligent conduct of a defendant and the alleged harm precluded a finding of proximate cause. Id. The trial court granted summary judgment on this basis. The Commonwealth Court reversed and held that "reasonable individuals can differ regarding the question of whether a two hour period should insulate a negligent actor from suit." Id., at 776.

Unlike Taylor, this case involves a nearly ten (10) year old statement by Curley and Schultz. Under the circumstances of the instant case, reasonable individuals could not differ as to whether the statement is too remote to have played a substantial factor in any alleged harm occurring to Plaintiff. Taylor is factually distinguishable and should not be applied here.

Next, Plaintiff cites Ayers v. Morgan, 154 A.2d 788 (Pa. 1959) for the proposition that there is "no shortage of cases" where "proximate cause is never an issue." See Plaintiff Brief in Opposition, at 13. Indeed, proximate cause was not even an issue raised before the Ayers Court. In fact, the Pennsylvania Supreme Court applied the Statute of Limitations Act, 12 P.S. § 34, to hold that medical

malpractice claims based on a medical procedure occurring beyond the applicable two (2) year statute of limitations period may proceed past the limitations period in certain circumstances. Id. Here, the University is not asserting a statute of limitations defense at this time and, therefore, Ayers clearly does not apply.[3]

Finally, Plaintiff relies on Al Hamilton Contracting Company v. Cowder, 644 A.2d 188 (Pa. Super. 1994). This case does not support Plaintiff's position; instead, it actually supports dismissal of Plaintiff's claims at the preliminary objections stage. See id. (dismissing legally unviable claims via preliminary objections).

Under the circumstances of this case, the misrepresentation claim is legally insufficient and should be dismissed. Contrary to Plaintiff's bare assertions, courts routinely sustain preliminary objections and dismiss claims for lack of proximate cause. See Brown v. Phila. Coll. of Osteopathic Med., 760 A.2d 863 (Pa. Super. 2000). The nearly decade-old alleged statement by Curley and Schultz is too remote to have proximately caused any alleged harm occurring to Plaintiff. See Memorandum of Law in Support of Preliminary Objections, at 20. The misrepresentation claim fails and Count III of the Complaint should be dismissed with prejudice.

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[3] A statute of limitations defense is properly raised in New Matter and the University is not waiving this defense. See Preliminary Objections to Complaint, at 13, fn. 3.

II. CONCLUSION

For all the foregoing reasons, the University respectfully requests that the Court sustain its Preliminary Objections and dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 14th day of March, 2013, a true and correct copy of the foregoing Reply to Plaintiff's Response to Defendant's Preliminary Objections to Plaintiff's Complaint was served upon the following persons via Overnight Mail, postage prepaid:

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