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IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION - LAW

MICHAEL J. MCQUEARY : NO. 12-1804

VS :

THE PENNSYLVANIA STATE UNIVERSITY :

TRANSCRIPT OF PROCEEDINGS
(Civil Jury Trial - Day 9)

BEFORE: Thomas G. Gavin, Sr. Judge
Specially Presiding
15th Judicial District

DATE: October 27, 2016

PLACE: Centre County Courthouse Annex
Annex Courtroom
108 South Allegheny Street
Bellefonte, PA 16823

APPEARANCES:

FOR THE PLAINTIFF:

Elliott Strokoff, Esq.
William T. Fleming, Esq.

FOR THE DEFENDANT:

Nancy Conrad, Esq.
George Morrison, Esq.
Kimberly Havear, Esq.

2016 OCT 27 11:12:57
CENTRE COUNTY, PA
PROthonotary
D. J. McQUEARY

ORIGINAL

1 NOTES BY: Thomas C. Bitsko, CVR-CM-M
2 Official Court Reporter
3 Room 208, Centre County Courthouse
4 102 South Allegheny Street
5 Bellefonte, PA 16823
6 814-355-6734 or fax 814-548-1158

7 INDEX TO THE WITNESSES

8 DIRECT CROSS REDIRECT RECROSS

9 PLAINTIFF:

10 (None)

11 INDEX TO THE EXHIBITS

12 ADMITTED:

13 PLAINTIFF:

14 (None)

15 DEFENDANT:

16 (None)

17 COURT:

18	No. 3	Jury question	174
19	No. 4	Jury question	174
20	No. 5	Jury question	175

1 P R O C E E D I N G S

2 (Whereupon, the following discussion
3 occurred outside the presence of the jury:)

4 THE COURT: I have one point I want to
5 address on the charge and then I have Mr.
6 Fleming's list of the exhibits that he would
7 like to go out, and I think I am going to agree
8 that until they ask for something, we're not
9 going to send anything out, but, if they ask,
10 then I assume you folks have had a chance to
11 look at the list.

12 MS. CONRAD: Do we have their list?
13 Okay. There is some overlap. Does Your Honor
14 want our list?

15 THE COURT: Yeah, I didn't get yours
16 yesterday evening, late. In any event, clearly
17 the expert reports don't go out, so 80 and 81
18 don't go out. Now, the only exception that I
19 would make is that if somebody asks for the
20 calculation, I would allow that page of the
21 accountant's report to go out so we're not
22 doing the mental gymnastics, because I think it
23 is in everybody's interest to have accurate
24 numbers. I did not have your expert's report
25 in front of me when he was testifying. Did he

1 have a comparable page where he laid out his
2 scenario? I got the understanding that it was
3 sort of intermingled through the whole thing.

4 MR. MORRISON: Correct, sir. There's
5 not an attachment of a chart with calculations.

6 THE COURT: But you could clearly put
7 an attachment together that did his math?

8 MR. MORRISON: Absolutely.

9 THE COURT: Similar to the attachment
10 the other side had.

11 MR. MORRISON: Of course.

12 THE COURT: So, if they're asking for
13 that, I suggest you put that together timely so
14 that we say, okay, here are the mathematical
15 calculations.

16 79, that's the exhibit of all the job
17 applications, that is not going anyplace,
18 because if they have not observed it and seen
19 it and heard about it and understand it,
20 sending that book out isn't going to happen, in
21 my mind.

22 MR. STROKOFF: Your Honor, even if
23 they end up asking for it.

24 THE COURT: Pardon me?

25 MR. STROKOFF: Even if they end up

1 asking for it?

2 THE COURT: Well, I will have to
3 consider -- in my own mind, I can't conceive
4 they're going to ask for it, but I will wait
5 and see. But, if they do, I will address it
6 then. Exhibit P39, which is the arrest and the
7 presentment, to the extent that they would ask
8 for it, the only thing that was identified and
9 never discussed was page 12, so the only part
10 of that they would get would be page 12.

11 MR. STROKOFF: And over to 13, it's
12 just a few lines, Your Honor.

13 THE COURT: Yeah. Okay. Other than
14 that, in all candor, counsel, I have to look
15 through your list now and run through that.

16 MR. STROKOFF: Actually, Your Honor, I
17 think the presentment is 35. 39 is the
18 statement from President Spanier with the
19 lawyer's comments.

20 THE COURT: Okay. All right. Then I
21 wrote my note on the wrong -- okay. So 35 is
22 the complaint and presentment, so it is pages
23 12 and 13, and 39 is what?

24 MR. STROKOFF: 39 is President
25 Spanier's statement with the two lawyers'

1 comments attached.

2 THE COURT: Okay. Fine. When we talk
3 about the misrepresentation, I am going to
4 indicate that, if the jury finds as a fact that
5 Mr. McQueary told Mr. Curley that what he
6 observed was sexual in nature and that Mr.
7 Curley repeated that to Schultz and Spanier,
8 that all three of those persons are mandated
9 reporters, and the reason for that is, of
10 course, Plaintiff's Exhibit No. 10, which is
11 the e-mail chain between Curley, Spanier, and
12 Shultz, wherein Dr. Spanier writes, "The only
13 downside for us is if the message isn't, and,
14 and then quote, 'heard,' close quotes, and
15 acted upon and we then become vulnerable for
16 not having reported it." Clearly, this
17 indicates that they were aware that it was a
18 reportable incident. So, for that reason, we
19 are going to tell the jury. Conversely, if
20 they find that he told them something else,
21 then they are not in that position, but I don't
22 know how the defense can take the position that
23 he told them something else when Dr. Spanier is
24 indicating they are vulnerable to not having
25 reported it, so I will hear you.

1 MS. CONRAD: Your Honor, may I
2 respond?

3 THE COURT: Yes.

4 MS. CONRAD: First, with respect to
5 whether they're vulnerable for not having
6 reported it, that could have any number of
7 meanings. That could mean they are vulnerable
8 if there is someone who brings to their
9 attention that Jerry Sandusky is seen on campus
10 and he has been told to not be on campus. Mr.
11 Schultz, Mr. Curley, even Dr. Spanier did not
12 testify as to the meaning of what that phrase
13 means, vulnerable for not having whatever the
14 rest of it provides. The plaintiff himself did
15 not pursue that line of questioning as to what
16 is meant by vulnerable. As a result, to make
17 such a conclusion, I would assert is
18 speculative and is not supported by the
19 evidence in this case.

20 Additionally, there is no evidence to,
21 in fact, establish that under the statute that
22 was in place at the time of the incident in
23 2001, that Mr. Curley, Mr. Schultz, or Dr.
24 Spanier were mandated reporters as defined by
25 the statute.

1 THE COURT: And school administrators.

2 MS. CONRAD: Additionally, that
3 according -- based on the statute, they did not
4 come into contact with children as a result of
5 their occupation or place of profession.

6 THE COURT: We can agree to disagree,
7 counsel. I'm going to tell them that, because
8 in the very same e-mail from Curley, he writes,
9 "I would plan to tell him we are aware of the
10 first incident," so when you read the first and
11 the second, everyone is free to draw their own
12 conclusions. You've got your point preserved.

13 MS. CONRAD: Your Honor, may I just
14 continue with the evidence that is on the
15 record? Dr. Dranov, let's look at his
16 testimony. Based on a witness the plaintiff
17 called, Dr. Dranov testified that, in 2001, he
18 was not a mandated reporter. If he was not a
19 mandated reporter, if he received information
20 from Mr. McQueary, then -- and even based on
21 his status alone, he testified that he was not
22 a mandated reporter nor did he have the
23 identity of the child to report as required
24 under this statute.

25 THE COURT: Dr. Dranov is entitled to

1 his opinion. I believe that Dr. Dranov was
2 wrong, that, in fact, he did have a duty to
3 report, but that's not the issue. The issue is
4 whether or not Curley, Spanier, or Schultz had
5 a duty to report.

6 MS. CONRAD: And, Your Honor, we have
7 been denied the opportunity to pursue this
8 issue. It was not raised by plaintiff at any
9 time. Plaintiff presented no expert testimony
10 as to whether or not Curley, Shultz, Spanier,
11 or Dranov was a mandated reporter.

12 THE COURT: The Court can take
13 judicial notice of the law and define the law.
14 Please, counsel, you have got your record
15 protected. If I'm wrong, I'm wrong. Okay.
16 Now, you submitted a point for instruction
17 number 38. Everybody got their points out
18 there someplace?

19 MR. MORRISON: Defamation, public
20 concern, Your Honor.

21 THE COURT: Have you got yours?

22 MR. STROKOFF: That's not mine.

23 THE COURT: I know it's not yours.
24 I'm looking to make sure everybody on the same
25 page when I say have you got yours. Okay. So

1 what is your position as to that point?

2 MR. STROKOFF: I don't see how it fits
3 into that category, Your Honor.

4 THE COURT: So how does it fit?

5 MS. CONRAD: This clearly is a matter
6 established by the witnesses that became a
7 public concern as the national media, as
8 recognized by Mr. McQueary himself, continued
9 to report this matter on national TV, on
10 national -- in national news media articles.
11 It became an issue of national public concern;
12 that is, the incidents that occurred, the
13 responses to those incidents, and the reaction
14 of the public.

15 Dr. Spanier himself testified that, in
16 relation with a statement that he issued, it
17 was a means of providing assurance to the
18 public that the university would be proceeding
19 in its day-to-day operations.

20 THE COURT: Well, Dr. Spanier made it
21 very clear that, if you're loyal to me, I'm
22 loyal to you, and this was an affirmation of
23 his loyalty to these two men. That is what he
24 was commenting on. He wasn't commenting on the
25 matters of public concern. He made it very

1 clear, and he repeated it when he met with the
2 people in the athletic department, that, if you
3 are loyal to me, I'm loyal to you, and that
4 was, as I read it, the purpose of the article
5 that he published.

6 MS. CONRAD: He published that article
7 first, as per the initial paragraph, that this
8 was an issue of concern and caring for victims,
9 is at most caring for children, is a matter of
10 concern at the university, and he then went on
11 to address the presentment, which was a matter
12 of concern within the university community and
13 to the public outside the community, and he
14 then expressed his opinion that, having worked
15 with Mr. Schultz and Mr. Curley for 16 years,
16 he believed that they were honest, had
17 integrity, had compassion, and that the record
18 will show that these charges are groundless.

19 MR. STROKOFF: Your Honor, a self-
20 serving press release without any
21 investigation, without even knowing -- without
22 even reading the presentment -- the presentment
23 is a matter of public concern. You would think
24 you would read the presentment. I just don't
25 think it fits into this; that it was of concern

1 to President Spanier. It was a concern --
2 well, it was a concern to him. It certainly
3 was not a matter of public concern that enjoins
4 this kind of First Amendment protection.

5 MS. CONRAD: The members of the public
6 knew and were familiar with Mr. Curley and Mr.
7 Schulz. This was Dr. Spanier's way of not only
8 assuring those members of the public that were
9 part of the Penn State community, but also the
10 members of the greater community, of the
11 university's concern and commitment to
12 children, as well as letting the public know
13 Dr. Spanier's opinion with respect to the
14 charges that were filed against Mr. Curley and
15 Schultz, which were all across the nation.

16 THE COURT: I'm going to go back up
17 and take a look at the case. I will let you
18 know as quickly as I have an answer for you.
19 Okay. Where is your list of exhibits, counsel,
20 for me to take a look at?

21 MS. CONRAD: I thought I handed it up
22 to you.

23 THE COURT: Did you hand it up?

24 MR. STROKOFF: We did, yes. I'm
25 sorry.

1 THE COURT: I don't have to respond to
2 your requests right now, because we are not
3 going to get to that issue unless somebody
4 asks, so I will take it up and take a look.
5 We'll be looking at the other matter first.

6 All right. We're still good with an
7 hour-and-a-half? Each side is comfortable with
8 the maximum of an hour-and-a-half?

9 MS. CONRAD: I have not timed it, sir,
10 but I believe it is within that hour-and-a-
11 half.

12 THE COURT: Fine. Okay.

13 (Recess)

14 (Whereupon, the jury entered the
15 courtroom.)

16 THE COURT: Good morning, everybody.
17 Have a seat, please.

18 MR. STROKOFF: Your Honor, may we
19 approach the bench for a second?

20 THE COURT: Yes.

21 MR. FLEMING: Judge, when I was
22 standing outside just a few minutes ago, I was
23 on the phone on the front porch of the
24 courthouse, and Juror No. 11, Mr. Gonder, was
25 coming up the ramp. I did not see him

1 approaching. He had a ski hat on and a jacket.
2 I did not see any juror badge. When he
3 approached me, he nodded his head. I caught it
4 out of the corner of my eye and I blurted out,
5 "Morning," something like that. That was it,
6 and I didn't even recognize that he was a juror
7 until he was right on top of me, Judge.

8 MS. CONRAD: I'm not sure which is
9 Juror No. 11.

10 MR. FLEMING: Mr. Gonder.

11 THE COURT: We should probably not say
12 that on the record. That's not the proper way
13 to identify him.

14 MS. CONRAD: I just took it off my
15 notes, sir.

16 MR. FLEMING: My apologies to the
17 Court, Judge, but honestly, it happened so
18 quickly, I didn't even recognize him because of
19 the ski hat.

20 THE COURT: I'm not concerned about
21 it. I said yesterday to two of the jurors,
22 when they were running back from lunch, "You
23 don't have to run. You can walk," so I think
24 that falls in the same category. I don't see
25 any point to voir dire him at this point.

1 MS. CONRAD: I don't know. I wasn't
2 there. I don't know the impact of it. I would
3 assume that Mr. Fleming is relating it
4 accurately.

5 THE COURT: Assuming, as an officer of
6 the court, that he is, and I'm taking it that
7 way.

8 Now, I will give you a heads up when
9 you are five minutes out from your maximum
10 allotted time, if we get to that point.

11 MR. STROKOFF: With respect to the
12 issue that Your Honor went up to look at on the
13 matter of public concern, I did look at the
14 pleadings, Your Honor, and the public concern
15 defense was not raised in the POs. It was not
16 raised in the answer. The only thing that was
17 raised in the answer was that the November 5
18 written comment was a personal opinion that
19 does not imply any knowledge of underlying
20 facts.

21 MS. CONRAD: I have not had the
22 opportunity to review --

23 THE COURT: You will have a chance to
24 do that before we instruct them, and I have the
25 case, and I'm trying to read it.

1 MR. STROKOFF: And the other thing is
2 like it doesn't say anything here. It just
3 says he's entitled to special protection. It
4 doesn't say where the cutoff is, and that's
5 going to be confusing.

6 THE COURT: We will have time to
7 discuss it before we --

8 MR. STROKOFF: Okay.

9 THE COURT: -- I don't think it's going
10 to be a key part of either closing.

11 MS. CONRAD: Thank you.

12 MR. FLEMING: Thank you, Judge.

13 (End of sidebar discussion)

14 THE COURT: Members of the jury, we
15 have reached that point in the trial where
16 counsel are going to proceed to give their
17 closing statement to you. Neither attorney
18 would intentionally misstate what a witness
19 said, so if there is any variance between what
20 counsel recalls the witness saying and you
21 recalling what the witness said, simply go back
22 to the jury room, figure out which one of you
23 heard the witness correctly, use the
24 information as you see fit. The attorneys are
25 free to talk about the law all they want, with

1 the understanding that I will have the final
2 say. I don't think there is going to be any
3 difference between what they say and I say,
4 because we have had a discussion as to what I'm
5 going to say.

6 One of the things that is going to be
7 a slight tweak from where we began, when we
8 began last week, I said that there were
9 multiple counts in the information, which is
10 common in a civil lawsuit. To give you the
11 complete text and the background of everything
12 that was occurring, we permitted you to hear
13 everything in the case that each side wanted to
14 present. One of the claims of Mr. McQueary is
15 a whistleblower claim. As a matter of law, the
16 Court is required to decide that issue, so you
17 may recall at various times we sent you out and
18 maybe you didn't come back quite as quickly as
19 you thought you were coming back, and that is
20 because at that point in time I was taking
21 additional testimony, because matters pertinent
22 to the whistleblower claim are not necessarily
23 pertinent to the defamation and the
24 misrepresentation claim. So, for efficiency
25 purposes, it made all the sense in the world to

1 essentially kill two birds with one stone, so
2 that's what was happening. So, for your
3 purposes, when the attorneys get up, they're
4 only going to be concentrating on the
5 defamation count and the misrepresentation
6 count, because they are the counts that you are
7 going to have to go ahead and decide, and I'm
8 telling you this because you might be saying,
9 "Well, why aren't we hearing about this other
10 matter?" That other matter is not properly
11 before you. That is a matter properly before
12 the Court, and I will decide that separately.

13 Again, you don't have your notepads.
14 The reason you don't have your notepads is you
15 are not getting any testimony. This is
16 counsel's opportunity to argue to you the facts
17 and the law, obviously in a manner that favors
18 the side they represent. But nonetheless, you
19 give it careful consideration, because they are
20 pulling everything together and suggesting to
21 you why their position is correct and the other
22 side is incorrect.

23 Even when you have heard all of that,
24 you are not in a position to decide the case
25 until you get the law from me. So, again, we

1 started more than a week ago with a blank sheet
2 of paper. Now you have got notebooks full of
3 information, your mind is full of information.
4 The attorneys are now going to suggest to you
5 how you should catalogue and consider that
6 information when you go back to the jury room
7 to reach your final verdict.

8 One of the things that will happen is
9 that, while they're arguing, I'm going to be
10 tweaking my paperwork. I have a good idea of
11 exactly where we are at, but as I'm listening
12 to them, I've got to be making some changes in
13 what I'm going to say to you, so disregard what
14 I'm doing, because at this point I have no
15 importance in the proceeding. You are focusing
16 on what they have to say. When each closing
17 argument is finished, we are going to take a
18 break. It's very demanding on the court
19 reporter to take straight dictation.
20 Previously, you ask a question, they think
21 about it, they give an answer, so they get a
22 break. Here, it's just going to be speaking
23 steadily, so we will take that break then. So,
24 having said that, again, open mind, listen to
25 what they have to say, and we are coming to the

1 end.

2 The other matter is the party who has
3 the burden of proof, which is Mr. McQueary,
4 argues last under our procedure, so Ms. Conrad
5 will argue first and then Mr. Strokoff will
6 argue last. So go ahead, Ms. Conrad.

7 MS. CONRAD: Thank you, sir.

8 Good morning. It has been a long two
9 weeks, and I appreciate your very careful focus
10 on the evidence as it has been presented.
11 Thank you. During this proceeding, you heard
12 from many current and former employees at Penn
13 State University, former president Rod
14 Erickson, former athletic director Mark
15 Sherburne, former assistant coach and athletic
16 director Frank Ganter, former HR manager Erikka
17 Runkle, and former head coach Bill O'Brien.
18 You also heard from Mr. McQueary's friends and
19 closest coworkers, Kirk Diehl, Brad Caldwell,
20 and as the days unfold during this proceeding,
21 you probably were facing information overload.
22 You were faced with processing all of this
23 evidence and now the law that the judge will
24 instruct you as it applies to the facts.

25 As you proceed, it is important again

1 to focus on what this case is about. You will
2 be deciding, as the judge related, two claims,
3 a defamation claim and a misrepresentation
4 claim. In the defamation claim, Mr. McQueary
5 alleges that a statement from Dr. Spanier and
6 comments that he made defamed him, caused harm
7 to his reputation for honesty and integrity,
8 and impaired his ability to earn a living in
9 his chosen profession of football. In the
10 misrepresentation claim, Mr. McQueary alleges
11 his reliance on certain statements that Mr.
12 Curley and Mr. Schulz made that he claims
13 branded him as being part of a cover-up and
14 that caused him irreparable harm and his
15 ability to earn a living.

16 Now, as you deliberate, I ask you to
17 consider the evidence, to consider all of the
18 evidence, the evidence that you have seen
19 through various exhibits, the evidence you have
20 heard through various witnesses, and as I
21 reminded you when we met Monday a week ago in
22 my opening statement, this is not a case about
23 Jerry Sandusky. Mr. Sandusky has been tried
24 and convicted. This is not a case about TI
25 mean, Curley and Gary Schulz. They were

1 charged with a crime, but it is important to
2 note that they have not yet had their day in
3 court. They have not been convicted. This
4 case is about events and claims relating to Mr.
5 McQueary's employment. Two claims relate to
6 his employment, the defamation claim and the
7 misrepresentation claim, as you will be
8 deciding.

9 Now, with respect to his defamation
10 claim, you heard evidence that Dr. Spanier's
11 statement don't name Mr. McQueary. You viewed
12 that statement, and you can determine that
13 nowhere in that statement does it name Mr.
14 McQueary. You also heard from people who knew
15 Mr. McQueary, worked with him on a regular
16 basis, and they related that when they viewed
17 that statement, when they heard those remarks
18 from Dr. Spanier in that meeting, they never
19 connected it to Mr. McQueary. The never
20 inferred that statement applied to Mr.
21 McQueary.

22 In fact, you will recall there were
23 only two witnesses, two witnesses that Mr.
24 McQueary presented in his case, the two
25 witnesses from the Office of the Attorney

1 General, and those witnesses who acknowledged
2 that Mr. McQueary is their key witness in a
3 case that is proceeding and the cases that have
4 already proceeded. It was only those two
5 witnesses that testified that they saw this
6 connection between Dr. Spanier's statement and
7 Mr. McQueary.

8 Now, with respect to Mr. McQueary's
9 misrepresentation claim, it is very important
10 to note and remember that you did not hear
11 testimony from Mr. Curley or from Mr. Schulz.
12 You did not hear from them during these
13 proceedings, and the testimony that you heard
14 about the statements they allegedly made to Mr.
15 McQueary does not establish a
16 misrepresentation. You did not hear evidence
17 that Mr. Schulz or Mr. Curley intended to
18 mislead Mr. McQueary. You did not hear
19 evidence that anyone deterred Mr. McQueary from
20 going to authorities about Jerry Sandusky. You
21 did not hear any evidence to support a claim of
22 misrepresentation, the same with respect to Mr.
23 McQueary's claim for damages.

24 The evidence established that Mr.
25 McQueary was not damaged by any action of the

1 university. Mr. McQueary, as he testified and
2 as he recognized, if he was harmed, was harmed
3 by national media and public opinion. And with
4 respect to this claim for lifetime earnings,
5 the evidence established that he failed to
6 obtain a position because of his own
7 shortcomings. So let's break down that claim.

8 I'm sure I don't have to remind you
9 about a part of the defamation claim, D20. You
10 probably hear that in your sleep. D20, the
11 Spanier statement, how many times has it been
12 referenced? How many witnesses testified about
13 it? But I ask you, as you deliberate, to focus
14 on the words of that statement. I'm not going
15 to re-show it to you. I'm sure you probably
16 know it inside and out by this point, but I do
17 ask that you focus on certain parts of it. In
18 that statement, Dr. Spanier says that I wish to
19 say that Tim Curley and Gary Schulz have
20 unconditional support. He goes on to express
21 his opinion: I have complete confidence in how
22 they handled the allegations about a former
23 university employee. He states that Curley and
24 Schulz operate at the highest level of honesty,
25 integrity, compassion, another opinion that he

1 is confident, not that the charges are
2 groundless. Do not be misled by that
3 characterization, but focus on the words of the
4 statement.

5 Dr. Spanier's opinion provides I'm
6 confident the record will show that these
7 charges are groundless and they conducted
8 themselves professionally and appropriately.
9 Even more significantly, within the words of
10 that statement, Dr. Spanier provides the basis
11 for his opinion, the basis for his statement.
12 He expressly provides that he has worked with
13 Tim and Gary daily for more than 16 years, and
14 it is upon that working relationship that he
15 forms these opinions and then presents them in
16 the statement.

17 We also ask you to think about who
18 read that November 2011 statement, either in
19 2011 or in conjunction with this litigation.
20 Recall those witnesses and how they responded
21 to questions about what the statement meant.
22 Frank Ganter, associate interim athletic
23 director, Erikka Runkle, HR manager, Mr.
24 McQueary's good friend, Brad Caldwell, Bill
25 Mahon, information -- public information --

1 Mark Sherburne, someone who had worked with Mr.
2 McQueary for years in athletics, Tom Poole, an
3 assistant to Gary Shultz. Each of them
4 confirmed their experience with either working
5 with Gary Schulz or with Tim Curley. Each of
6 them testified to their personal knowledge that
7 Curley or Schulz operated at the highest level
8 of honesty, integrity, and compassion. Each of
9 them testified that they viewed Dr. Spanier's
10 statement as a statement of opinion about --
11 that was premised upon his working relationship
12 with Dr. Spanier. All of the individuals had
13 some familiarity with the presentment that was
14 issued that November 4-5, 2011, and even with
15 that knowledge about the information contained
16 in the presentment, information that counsel
17 referred to again and again through his
18 examinations, despite that information, each of
19 those witnesses, witnesses who knew Mr.
20 McQueary, worked with Mr. McQueary, testified
21 that they never connected that statement to Mr.
22 McQueary. They never inferred that the
23 statement meant that Mr. McQueary lied to law
24 enforcement or committed perjury, and they
25 never viewed the statement as being a negative

1 reflection on Mr. McQueary or causing harm on
2 Mr. McQueary. They saw the statement as an
3 expression of opinion, based on Dr. Spanier's
4 working day-to-day with Curley and Schulz.

5 I do want to speak a moment about the
6 testimony of Rod Erickson. You will recall Dr.
7 Erickson assumed the position of interim
8 president during that very chaotic week in
9 November 2011. You will recall that Dr.
10 Erickson was confronted by counsel, confronted
11 several times with the Spanier statement and
12 the presentment, and remember the manner in
13 which counsel questioned Dr. Spanier. Remember
14 the words he used when confronting Dr. Spanier.
15 You may recall -- Dr. -- I'm sorry. I'm saying
16 Spanier. Getting my doctors mixed up here. It
17 was Dr. Erickson that testified, and you may
18 recall, that after he read the statement, he
19 did not connect it to Mr. McQueary.

20 Counsel then pushed and put the words
21 of the presentment in front of him, put the
22 statement in front of him, and said, "Sir,
23 could you tell me how the charges could be
24 groundless if Mike Mr. McQueary didn't lie
25 about what he told Curley and Schulz?" Think

1 about that question. First of all, it's not an
2 accurate characterization of the statement.
3 The statement doesn't say the charges are
4 groundless. The statement says, "I'm confident
5 the record will show that the charges are
6 groundless," yet confronted with this
7 mischaracterization, confronted with these
8 questions, Dr. Erickson, in an honest and
9 candid manner, responded. He looked at the
10 presentment; he looked at the statement, and
11 testified if there is a connection, it would
12 only be very, very tenuous. He went on to say,
13 "I didn't view Mike McQueary as dishonest."

14 Now, I ask you, when you consider that
15 line of questioning, that line of testimony,
16 you consider it with your notion of common,
17 practical, everyday sense. Consider, as you
18 look at that statement, how you would have read
19 it if you happened to pick it up and read it in
20 a newspaper, if you happened to see it in a
21 news media reports, or if someone talked to you
22 about what they read in that statement, you
23 would not be doing a side-by-side of the
24 statement in the presentment. You would be
25 looking at the four corners of that statement,

1 and from that statement, I would ask you to
2 consider how the witnesses testified and how
3 they viewed it. The evidence simply does not
4 support that there is any connection in that
5 statement to Mr. McQueary. There is no
6 evidence to support that Mr. McQueary lied or
7 he committed perjury.

8 Moving to the misrepresentation claim,
9 it's important for you to recognize the
10 plaintiff has the burden of proof to establish
11 the elements in that claim, and because of
12 that, it is important to note that plaintiff
13 must prove a representation that is material
14 and made falsely. It must be a
15 misrepresentation. I ask you to carefully
16 consider the testimony of Mr. McQueary as you
17 consider this claim, recalling that Mr. Curley
18 and Schulz were not here to testify as to their
19 recollection of the events.

20 You will recall that this Court
21 provided to you Mr. Curley and Schulz asserted
22 their Fifth Amendment right to not testify in
23 this matter. They are facing trial on the
24 charge against them, and it is their
25 constitutional right to not testify in this

1 proceeding. They exercised that right, and, as
2 a result, did not testify about those
3 statements. So focusing on what Mr. McQueary
4 testified about the information he recollects
5 that Mr. Curley and Schulz told him in that
6 meeting in 2001, Mr. McQueary testified that
7 Mr. Curley and Mr. Schulz told him that they
8 took the matter seriously, that they would see
9 it was properly investigated, and that they
10 would take appropriate action.

11 Now, you have heard from various
12 witnesses about the events that occurred that
13 Friday night in 2001. You heard from various
14 witnesses about what information they received
15 and about what they recollected about that
16 information. One of the witnesses that you
17 heard from was Wendell Courtney, an attorney
18 who acted as general counsel to the university,
19 and you heard from Mr. Courtney that he
20 received information from Mr. Schultz about the
21 incident as it was reported to him, and Mr.
22 Courtney testified that he provided advice to
23 the university, advice that, after reviewing
24 the information, which you may recall his
25 recollection did not include a report of sexual

1 abuse; it related a report of horsing around or
2 sliding in the showers, and Mr. Courtney
3 advised Mr. Schulz that, in his view, report
4 it. It's the smart and prudent thing to do.
5 It's the thing to do in an abundance of
6 caution. Again, recall the testimony of Mr.
7 Courtney. He indicated he had no information
8 about sexual abuse. He indicated that even his
9 advice to report the incident, because it was a
10 smart, prudent thing to do, was not a required
11 report that the university had to make.

12 Also recall the recollection of Dr.
13 Dranov and John McQueary, Mr. McQueary's
14 father. You may recall that their recollection
15 of the incident as reported to them was
16 different. It was not the same, and even Dr.
17 Dranov testified that, based on the information
18 he received, he did not receive any report of
19 child sexual abuse, and while he acknowledged
20 that -- and he further acknowledged that, based
21 on the information he received, based on that
22 particular situation, he was not a mandated
23 reporter, and he indicated that he did not know
24 the name of the child, and, as a result, was
25 not in a position to report.

1 You also heard from Mr. McQueary
2 himself that, following that incident,
3 following that meeting with Mr. Curley and Mr.
4 Schulz, where they told him that they took the
5 matter seriously, would see that it was
6 properly investigated, and take appropriate
7 action, 10 days later Mr. McQueary testified
8 that he received a follow-up call from Mr.
9 Curley. Mr. Curley, according to the plaintiff
10 himself, Mr. McQueary, contacted him and told
11 him that, number one, they told the Second
12 Mile, and, number two, they told Jerry Sandusky
13 that he is no longer allowed to bring kids into
14 the facilities, and, number three, that they
15 decided to take his keys away, the keys of
16 Jerry Sandusky. That evidence establishes that
17 there was no misrepresentation. Mr. Curley and
18 Mr. Schulz informed Mr. McQueary about the
19 steps they were taking and had taken after that
20 initial meeting. The evidence and Mr.
21 McQueary's testimony about Curley and Schulz
22 simply do not meet the elements of a claim for
23 misrepresentation.

24 The evidence established that they
25 took the matter seriously, they would see it

1 was investigated, and they took appropriate
2 action. The evidence establishes 10 days
3 later, they followed up with Mr. McQueary and
4 informed him about the actions they had taken.
5 There is no misrepresentation, and there is no
6 evidence that Mr. Curley or Mr. Schulz's
7 statements were made with the intent to mislead
8 or induce plaintiff not to report the matter to
9 any law enforcement agency. No one -- no one
10 said to the plaintiff you are not permitted to
11 report to the police or agency. No one told
12 Mr. McQueary you cannot go to the police, and
13 between that incident in 2001 and the damages
14 Mr. McQueary alleges in 2011, there is simply
15 no connection between the representations that
16 Mr. Curley and Schulz made to him in 2001 and
17 the damages he seeks here in 2011.

18 The evidence established that the
19 Spanier statement did not defame Mr. McQueary,
20 did not cause him harm, and there was no
21 misrepresentation, no link between the 2001
22 statements, Curley and Schulz, to the 2011
23 damages Mr. McQueary now claims.

24 Let's consider for a moment those
25 damages. The evidence established during the

1 proceeding what he claims first, the loss of a
2 bonus from the Ticket City Bowl game; two, the
3 loss of the use of a car for over three months;
4 three, the penalty he incurred for cashing in
5 his 401(k); and, four, loss of lifetime
6 earnings in the field of football coaching. It
7 is important to put these claims, these claims
8 for damages into context. To do that, we need
9 to return to the events of 2011.

10 You will recall on November 4-5, 2011,
11 the grand jury presentment was released. Mr.
12 Sandusky was charged with numerous counts
13 related to sexual abuse of minors, and two
14 university officials, Tim Curley and Gary
15 Schulz, they were each charged with one count
16 of failure to report, one count of perjury, and
17 it was at that moment in time that the chaos
18 began, the media storm, the messages, the e-
19 mails, the news articles about the allegations
20 against Jerry Sandusky. And, as you heard, as
21 that week unfolded, the identity of the unnamed
22 graduate assistant was reported by the media.
23 The media storm grew. The communications
24 flooded the university, and by this time the
25 communications, the articles, were fixated on

1 Mr. McQueary's failure to act. The messages,
2 the articles, expressed public outrage and
3 widespread criticism for Mr. McQueary not
4 having acted more decisively in February 2001,
5 when he walked away from that horrible scene.

6 Amidst the chaos, the flood of
7 communications, the university, while
8 continuing its educational operations, made
9 critical and significant decisions. On
10 November 9, 2011, President Spanier was removed
11 from his office. At the same time, the head
12 football coach, Joe Paterno, was removed from
13 his position. You saw, you heard the emotional
14 reaction with respect to the removal of Joe
15 Paterno.

16 At the same time, the university
17 continued to be flooded with communications.
18 The crisis mounted. There were riots,
19 demonstrations, and the media presence
20 everywhere on campus and in State College, and
21 you heard from university witnesses, including
22 Rod Erickson, Erikka Runkle, Bill Mahon, Lisa
23 Powers, about the information that was flooding
24 into their offices, communications that the
25 university receives, expressing the outrage

1 directed towards the terrible, tragic acts of
2 Jerry Sandusky, the shock at the charges
3 against the two administrators, and disbelief
4 about the removal of Coach Joe Paterno.

5 We also heard that, from the
6 university witnesses that testified, there was
7 a profound sadness during this time, an
8 emotional outpouring and reaction and concern
9 for all that was taking place. At the same
10 time, though, the university had to address
11 what was happening on campus. It had to
12 address the safety factors that included bomb
13 threats, death threats, and, in particular,
14 threats made against Mr. McQueary.

15 You will recall that Thursday morning,
16 November 10, when Coach Bradley had been named
17 interim head coach and he holds that press
18 conference, and during that press conference he
19 is asked, "Will Mike McQueary be coaching
20 Saturday in that Nebraska game?" Coach Bradley
21 answers, "Yes, Mike McQueary will be coaching
22 on Saturday. It will be a game-day decision
23 whether he's coaching on the sidelines or in
24 the press box." As of Thursday morning,
25 everyone believed that Mr. McQueary would be

1 coaching.

2 Coach Bradley was also asked about the
3 intense national security that was directed on
4 Mr. McQueary and whether or not it was
5 appropriate for Mr. McQueary to be coaching in
6 that game. Coach Bradley responded, "That is a
7 decision up to the administration." At this
8 time and as result of the national coverage,
9 the articles that were reported, and most
10 significantly the increased communications that
11 the university was receiving about Mike
12 McQueary, Dr. Erickson took action. You heard
13 him testify. You heard him testify that the
14 president's office, the office he now occupied,
15 was receiving vile, hateful messages against
16 Mr. McQueary. Dr. Erickson testified those
17 were messages like he had never seen before.
18 He had known Mike as a young child, I believe
19 playing ball with his son. Dr. Erickson
20 received further information in addition to
21 what his office was receiving, information from
22 athletics, information from the Office of
23 Public Information, and they, too, were
24 receiving the same type of threats, death
25 threats, serious threats against Mike McQueary.

1 The evidence established that Mr.
2 McQueary himself was also receiving those
3 threats, and Mr. McQueary took those threats
4 that he had received and he forwarded them to
5 his contacts at the Office of Attorney General,
6 and you will recall that some of those messages
7 that he sent to his contacts at the Office of
8 Attorney General, including articles that
9 stated he is worse than Sandusky; words cannot
10 begin to describe the intensity of rage I feel
11 for you; e-mail messages that provided your
12 name has been smeared forever, and even one
13 stating I want to kill you, you F-ing piece of
14 S-H-I-T.

15 Now, you will recall that you heard
16 that Mr. McQueary, in his communication to the
17 Attorney General, at that time was reaching out
18 for support from them. He expressly, in his e-
19 mail message to them, provided nowhere is there
20 strong support, based on the press conference
21 the Attorney General's office had done, for me.
22 There just isn't any. And despite that request
23 for support, did you hear any information from
24 those two witnesses from the Office of Attorney
25 General as to what support they were providing

1 to Mr. McQueary?

2 Mr. McQueary also asked about whether
3 he could -- what are his options as far as a
4 statement will go? Mr. McQueary was exploring
5 whether he could make a public statement from
6 his contacts at the Office of Attorney General.
7 Do you recall the testimony of Ms. Eshbach and
8 Mr. Sassano, where they expressly stated that
9 it was their recommendation he not respond to
10 those statements.

11 The evidence will show that, at the
12 time, Mr. McQueary was receiving these threats,
13 forwarding them to the Office of Attorney
14 General. He also went to a good friend and
15 colleague. I believe he even described him as
16 a mentor, Fran Ganter, and Fran Ganter
17 testified that Mr. McQueary informed him that
18 he was receiving advice, advice from law
19 enforcement that he should leave town that
20 weekend and not coach the Nebraska game. Mr.
21 McQueary was seeking advice from his good
22 friend and colleague as to what he should do.
23 Should he coach or should he leave town for the
24 weekend based on the advice of law enforcement?

25 And Rod Erickson himself expressed

1 concern that, as he considered the situation,
2 he did not want another tragedy to occur. Dr.
3 Erickson made the decision that, due to safety
4 concerns, McQueary would not be coaching during
5 the Nebraska game. In response to questions
6 from the press, Dr. Erickson stated it became
7 clear; Coach McQueary could not function in his
8 role under these circumstances. And, as you
9 have heard from Mr. McQueary's coworkers and
10 friends, they were genuinely, genuinely
11 concerned for Mr. McQueary's safety.

12 Now, on the morning or on the evening
13 of November 10, remember Coach Bradley was
14 saying Coach McQueary is going to be coaching.
15 We are now to the evening, November 10. Dr.
16 Erickson has made his decision that, due to
17 safety reasons, Mr. McQueary will not be
18 coaching, and he asks Mark Sherburne to relate
19 that information to Mr. McQueary. And, in
20 fact, Mark Sherburne forwarded to Mr. McQueary
21 a proposed statement, not a final statement, a
22 proposed statement that Penn State athletics
23 would release to inform the public about Mr.
24 McQueary's status. In that statement, Mark
25 Sherburne provided that, due to -- that Coach

1 Bradley and Coach McQueary had decided it would
2 be in the best interest of the team and the
3 school that Mr. McQueary not coach and not be
4 in attendance at this game with Nebraska on
5 Saturday.

6 Upon receipt of this proposed
7 statement, I want you to think very carefully
8 about how Mr. McQueary responded, and that
9 evidence is contained in these e-mail exchanges
10 and was testified to by Mark Sherburne. What
11 does Mr. McQueary do upon receipt of a proposed
12 statement? He replies to Mr. Sherburne, "Hold,
13 hold that statement," and why does he want that
14 statement held? Because he was consulting with
15 his lawyers, and not just his lawyers, but he
16 is consulting with his PR guy. Now, think
17 about that. It is November 10, 2011. At this
18 point in time, he has been told that he is not
19 going to be coaching the Nebraska game because
20 of safety concerns, and at this point in time,
21 he has already consulted with lawyers he has
22 retained and a PR consultant he has retained,
23 and what does he send back to Mr. Sherburne but
24 a revised statement, a revised statement after
25 he has consulted with his lawyers and his PR

1 consultant that provides, due to multiple
2 threats made against Assistant Coach McQueary,
3 the university has decided it would be in the
4 best interest for all that Coach McQueary not
5 be in attendance at the Saturday game.

6 It was information added by Mr.
7 McQueary, his lawyers, and a PR guy that, due
8 to multiple threats, Mr. McQueary would not be
9 coaching in that Nebraska game. And you also
10 heard testimony from Mr. McQueary and the
11 witnesses from the Attorney General's office
12 that they believed that the threats were not
13 credible. They should be ignored. One witness
14 testified that you don't respond to kooks,
15 nuts, crazy people. In contrast, the
16 university viewed those threats as serious.
17 Dr. Erickson determined he didn't want another
18 tragedy to happen, and he determined, in
19 consultation with Cynthia Baldwin, Bill Mahon,
20 Steve Shelow (phonetic), based on all of the
21 information that he received from all of these
22 offices that responsive action was warranted.
23 As you heard Dr. Erickson testify, he went on
24 to decide to place Mr. McQueary on
25 administrative leave, administrative leave with

1 pay.

2 Mr. McQueary received for the duration
3 of his appointment, of his contract term, full
4 pay and benefits for that entire period until
5 his contract expired June 30, 2012. The
6 evidence will also establish that in the months
7 that followed this chaos, the university moved
8 forward, and it moved forward in its commitment
9 to the welfare and safety of children. You
10 heard Dr. Erickson testify about the
11 university's commitment to establishing a
12 center for protection of children, which will
13 support the prevention and treatment of child
14 abuse. You heard Dr. Erickson testify as to
15 the university's partnering with the
16 Pennsylvania Coalition Against Rape and the
17 National Sexual Violence Resource Center, and
18 you heard that, in 2011, the university
19 committed \$1.5 million from Penn State's share
20 of the year's bowl bonus revenues to these
21 concerns.

22 Dr. Erickson testified it didn't stop
23 there. The university has continued its
24 commitment to the center with long-term
25 funding, to that center and to other programs

1 for the protection and treatment related to
2 child abuse. Return then to the paid
3 administrative leave that Mr. McQueary was on.
4 During that time, remember Coach Joe Paterno
5 was no longer head coach. There was an interim
6 head coach, Coach Bradley, but the university
7 decided to begin a national search for a head
8 coach, and you heard from members of the
9 athletic department, Fran Ganter, Kirk Diehl,
10 Brad Caldwell, as well as coaches at other
11 universities, Coach Rhule at Temple, and even
12 Coach O'Brien, before he came in, that, when a
13 new head football coach is named, every
14 assistant coach knows that he or she faces
15 termination from their position, which is why
16 he even testified that long before he had been
17 named head coach, in his mind, he had prepared
18 a list of the coaches that, if he were ever
19 named head coach, he would bring with him, and
20 he had that list when he interviewed at Penn
21 State for the position of head coach. He knew
22 the assistant coaches he wanted on his staff,
23 and he informed Penn State even before he was
24 hired that he had that list and he had coaches
25 who had already committed to him to come to

1 Penn State if he were appointed head coach, and
2 on that list was wide receivers coach Stan
3 Hixon.

4 You will recall that Mr. McQueary,
5 while he coached at Penn State, held the
6 position of wide receivers coach. Coach
7 O'Brien testified that the reason he wanted to
8 bring Stan Hixon in was, number one, because he
9 had coached with Stan Hixon. He had coached
10 with him at Georgia Tech, and he knew that he
11 and Coach Hixon had that fit, that chemistry we
12 learned from the experts that testified. He
13 also knew that Coach Hixon had professional
14 experience. He had coached for the Redskins
15 and the Buffalo Bills. He had coached at six
16 different colleges during his career.

17 Coach O'Brien also had Stan Hixon
18 committed to come with him to Penn State if he
19 was offered the position of head coach. So,
20 after he was appointed, Coach O'Brien contacted
21 and brought his roster that he wanted on his
22 team, and you heard him testify he ended up
23 with two open spots. The two coaches that he
24 wanted for the positions, for whatever reason,
25 could not join him, and based on information

1 that he had received during his interviewing
2 process, he retained two of the Penn State
3 coaches that had served under Joe Paterno,
4 Coach Vanderlinden and Coach Johnson, and you
5 heard the testimony about Coach Johnson and
6 Coach Vanderlinden. The players themselves had
7 expressed their voice that, if a new head coach
8 was going to be named, if a new head coach was
9 going to be brought in from the outside, would
10 the university consider keeping Coach
11 Vanderlinden and Coach Johnson to help with the
12 transition? Coach O'Brien also knew of Coach
13 Johnson's and Vanderlinden's national
14 reputation, and based on that reputation and
15 his review of them and his references, he knew
16 again that the fit would be there. The
17 chemistry would work.

18 The evidence established, though, that
19 Mr. McQueary, if you look at his profile
20 compared to Stan Hixon, he didn't have the same
21 depth of experience as Stan Hixon. He didn't
22 have the national reputation of Johnson and
23 Vanderlinden. There was no spot for him on
24 Coach O'Brien's staff. This wasn't true just
25 for Mr. McQueary. This was true for the

1 majority of other Penn State coaches who had
2 coached under Joe Paterno.

3 You heard Coach O'Brien when he said
4 he had to meet with these coaches, and he had
5 to meet with these coaches not to interview
6 them. He had to meet with these coaches to let
7 them know he was terminating their employment
8 because he did not have a spot on his staff.
9 He didn't have a spot because he filled those
10 positions with those coaches that had been on
11 his mind, on his list, well before he had even
12 been named head coach.

13 Now, Mr. McQueary has asserted the
14 position that he was denied the opportunity to
15 have a courtesy interview with Coach O'Brien, a
16 courtesy interview that some, but not all, of
17 the other assistant coaches had with Coach
18 O'Brien, but the evidence clearly establishes
19 that, at the time of those interviews, at the
20 time of those meetings, Mr. McQueary was on
21 administrative leave. He was the only coach on
22 administrative leave, and Coach O'Brien
23 testified -- you may recall him stating that,
24 even if -- even if he had interviewed Mike
25 McQueary, Coach O'Brien would not have hired

1 Mike McQueary.

2 The evidence further establishes, as
3 we move on in time, June 30, 2012, Mr.
4 McQueary's employment with the university
5 ended. His fixed-term contract ended, and he
6 had been informed about that fixed-term
7 contract back in that meeting in November of
8 2011. He had full knowledge about that
9 contract, and yet the evidence shows he took no
10 action to reach out to Ms. Runkle while Coach
11 Bradley was still there and ask any questions
12 about the nature of his employment, to ask
13 whether he could be interviewed by Bill
14 O'Brien, to ask whether his contract was
15 expiring. He took none of those actions, and
16 ultimately it was decided by Dave Joyner,
17 athletic director at the time, and Dr. Erickson
18 that Mr. McQueary would not receive a new
19 appointment, and the reason he would not
20 receive a new appointment was because there was
21 no spot for him on Bill O'Brien's staff.

22 But the evidence will show, and did
23 show, that even after his administrative leave
24 ended, his paid administrative leave ended,
25 that Mr. McQueary received the benefits of a

1 severance agreement that he had. Mr. McQueary,
2 like most of the other assistant coaches under
3 Coach Paterno, had letter agreements that
4 provided severance payments in the event, one,
5 they were employed as an assistant coach at the
6 time of Coach Paterno's departure as head
7 coach, and, two, their employment ended as a
8 consequence of a decision by a new head coach.
9 Dr. Joyner and Dr. Erickson testified that they
10 looked at the terms of that severance agreement
11 at the time Mr. McQueary's appointment ended on
12 June 30, 2012. Remember, the coaches, their
13 appointments ended back when Coach Paterno
14 informed them that he was not retaining them
15 and their employment was terminated. Their
16 severance began at that point in time. At that
17 point in time, Mr. McQueary was still on leave.
18 He was still receiving full benefits and
19 salary, because the university was honoring its
20 obligations under his appointment. So, as of
21 June 30, 2012, the university then considered
22 in the months that followed whether or not Mr.
23 McQueary was entitled to that severance, even
24 though he wasn't terminated back at the time
25 that Coach O'Brien made his decision.

1 Ultimately, and you heard the testimony, Dr.
2 Joyner, Dr. Erickson, they decided it was the
3 right thing to do; it was the fair thing to do
4 that Mr. McQueary receive his severance
5 benefits, and I want you to consider the
6 nature, the amount of those severance benefits,
7 18 months of full salary and full benefits.
8 That means he received a salary amount equal to
9 over \$200,000, plus benefits, and that was on
10 top of a salary and benefits he received while
11 he was not working during the term of his
12 contract. Mr. McQueary has already received
13 close to \$280,000 from the university, plus
14 full benefits, for a period of time that he was
15 not working.

16 Turning to damages, let's consider now
17 those damages that I outlined for you
18 previously, the damages that Mr. McQueary
19 seeks, a bowl bonus. Now, you heard from Fran
20 Ganter, Mark Sherburne, Kirk Diehl, and Brad
21 Caldwell that, yes, they received a bonus from
22 the Ticket City Bowl, but recall their
23 testimony. That bonus was earned because of
24 working an additional month, of practices to
25 get to the game, and then coaching that game or

1 working that game weekend. Mr. McQueary did
2 not participate in those practices. Mr.
3 McQueary did not work that game or those
4 practices. He was on administrative leave,
5 and, as a result, he did not perform any
6 services in conjunction with the game, and, as
7 a result, he was not paid a bonus.

8 You also heard testimony about a
9 dealer vehicle and cell phone. There, I ask
10 you again to consider the testimony of the
11 witnesses. Ms. Baldwin and Ms. Runkle
12 testified that the dealer vehicles were
13 provided to the assistant coaches in order to
14 carry out their job duties and
15 responsibilities. At the time Mr. McQueary was
16 placed on administrative leave, he no longer
17 was performing those duties and
18 responsibilities. He no longer had the need
19 for a university dealer vehicle, and Mr.
20 McQueary, unlike others, did not have a
21 contractual provision that addressed continued
22 use of these items during his leave. The tax
23 penalty associated with the withdrawal of the
24 401(k), consider who made the decision to
25 withdraw that amount. It was Mr. McQueary.

1 And who made the decision to withdraw the
2 amount of over \$150,000 from that account? It
3 was Mr. McQueary, and that decision was made
4 within weeks after -- within weeks that
5 followed, that Mr. McQueary learned that, in
6 fact, he would be receiving his severance
7 benefits that equaled over \$240,000.

8 Finally, the claim for lifetime
9 earnings and benefits as a coach. You heard
10 conflicting testimony about this claim,
11 testimony from vocational experts, economic
12 experts, and I want to try to bring this
13 information into a manageable format and into
14 one that, if you get to damages, you can
15 consider, and I want to start with the
16 testimony that John Parry provided. You recall
17 that John C. Parry testified as an athletic
18 director and provided his opinion with respect
19 to Mr. McQueary's ability to go on in the field
20 of coaching. You will recall that I questioned
21 Mr. Perry about his connection to college
22 football in the past 10 years, and he
23 acknowledged he has not been part of the
24 college football scene during those years, and
25 he acknowledged that he has not, at any time in

1 preparation for completing his report, spoken
2 to any head coach about Mr. McQueary's
3 prospects for a position.

4 Mr. Parry opined that Mr. McQueary had
5 every reason to believe that he would have a
6 successful career as an NCAA Bowl Championship
7 Series football coach, and he went on to opine
8 that Mr. McQueary, in seven years and the
9 continued success of Penn State football, would
10 have been hired as an offensive coordinator or
11 a head football coach. You will recall, when I
12 asked him on cross-examination, there is no
13 guarantee of the continued success of Penn
14 State football, is there? And he acknowledged
15 that. He also acknowledged that a coach's
16 career can derail with one bad season. He also
17 acknowledged that Mr. McQueary had never
18 coached as an offensive coordinator, and that
19 Mr. McQueary had not coached as a head coach.

20 He went on to testify that he believed
21 that the actions and words of those in
22 positions of leadership at the university
23 irreparably harmed Mr. McQueary's ability to
24 continue in his chosen profession as a college
25 football coach. But I want you to recall his

1 answers when I asked him about what he based
2 that opinion on, and he started by saying that
3 he based his opinion that McQueary's prospects
4 were irreparably harmed based on the Spanier
5 statement. He goes back to that Spanier
6 statement, but what he testified to was that he
7 based his opinion on the statement that
8 provided that charges against Curley and Schulz
9 are groundless. Again, that is not what the
10 statement said. The statement said -- the
11 record will show, in Dr. Spanier's opinion,
12 that the charges will be groundless. Mr. Parry
13 also acknowledged he did not speak, consult, or
14 have any information from one head coach that
15 the Spanier statement would irreparably harm or
16 impact Mr. McQueary's ability to get a job.

17 Mr. Parry went on then to say he based
18 his opinion on the fact that Dr. Spanier made
19 the statement in a meeting with the
20 intercollegiate athletics staff and the head
21 coaches; that he, in that meeting, provided his
22 support for Mr. Curley and Schulz. Again, I
23 asked him, did you speak to anyone that was in
24 that meeting? The answer was no. Did he check
25 with anyone, such as head coaches or those who

1 were doing hiring as to whether or not those
2 statements would impact Mr. McQueary? He did
3 not. There is no evidence on this record to
4 establish that those two statements had any
5 impact on Mr. McQueary's ability to obtain a
6 job.

7 Mr. Parry went on then and said his
8 opinion is further based on the decision not to
9 allow Coach McQueary to coach in that Nebraska
10 game, but he makes no reference to the reason
11 that Mr. McQueary was not permitted to coach;
12 that is, due to multiple death threats, and
13 there is no testimony from any head coach, from
14 any prospective employer, that that reason,
15 that decision that Mr. McQueary could not coach
16 that Nebraska game due to multiple death
17 threats, had any impact on Mr. McQueary's
18 career. He went on to testify that the
19 decision to place Mr. McQueary on
20 administrative leave and banning McQueary from
21 all Penn State football facilities negatively
22 impacted Mr. McQueary's ability to get a good
23 job, and I apologize if I sound like a broken
24 record, but again, when I asked Mr. Parry, do
25 you have any information about any head coach,

1 about any prospective employer, that didn't
2 hire Mr. McQueary because of the fact he was
3 placed on administrative leave, he had none.

4 Step away from Mr. Parry for a moment
5 and consider the testimony of Coach Rhule. You
6 will recall that Coach Rhule was the head coach
7 at Temple University, and he was asked by
8 counsel, "Wouldn't you agree that, by placing a
9 coach on administrative leave, that would send
10 a negative message?" Coach Rhule said, "No, I
11 didn't see it or I wouldn't read it that way."
12 Finally, Mr. Parry also claims that Mr.
13 McQueary was irreparably harmed in his ability
14 to get a job because Coach O'Brien didn't
15 interview him, but you heard the testimony of
16 Coach O'Brien. You heard the testimony that,
17 even if he had interviewed him, there was no
18 spot for him, and there is no evidence to
19 establish that Mr. McQueary hasn't gotten a job
20 outside of Penn State because Coach O'Brien
21 didn't hire him.

22 I want you to contrast the testimony
23 you have heard from Mr. Parry to the testimony
24 that you heard from Pete Roussel (phonetic),
25 Pete Roussel, who testified that the reason

1 that his opinion was that Mr. McQueary did not
2 get a job was because Mr. McQueary had not
3 developed the resume to catch the attention of
4 some other head coach's eye and he had not
5 developed a network that is needed to continue
6 to be connected with head coaches, to get
7 noticed, and to be considered for their staff.

8 It is undisputed that Mr. McQueary
9 stayed at one school, under one head coach, and
10 coached with a group of assistant coaches where
11 there was minimal turnover. He simply didn't
12 develop the network, and you heard from Pete,
13 as well as from Mr. Parry, when a head coach is
14 making this decision, the most important
15 criteria is that of fit, the fit between a head
16 coach and the assistant coach. That head coach
17 wants chemistry, to know that the two will
18 mesh, and how does a head coach determine
19 whether or not that mesh, that fit, will occur?
20 You heard from Coach Matt Rhule, Matt Rhule,
21 who later received messages from Mr. McQueary
22 about a position on his staff. A head coach
23 knows whether or not that fit is going to exist
24 based on whether or not he worked with a head
25 coach, and that is one of the prime connections

1 in college football, that relationship you
2 develop with a coach, working with another
3 coach, maybe moving on to different
4 institutions, but maintaining that relationship
5 so, if the opportunity presents itself, there
6 is an opportunity to reconnect. The evidence
7 established that Mr. McQueary did not have that
8 system of networks, did not maintain those
9 relationships to make that connection.

10 The evidence also established, as Matt
11 Rhule testified, that he didn't have the
12 qualifications, the experience, to be
13 considered by Matt Rhule when he was making his
14 hiring decisions at Temple University, and as
15 he further referenced, that was critical in
16 terms of getting noticed and going after those
17 positions, is to present yourself in a way to
18 get noticed. Pete Roussel testified that there
19 was nothing remarkable in Mr. McQueary's
20 resume, and Mr. Roussel testified that, in his
21 work as an agent and assistant coaches, what he
22 does is help to market them and package them so
23 as to get noticed. There is no evidence in
24 this record that Mr. McQueary engaged in any
25 activity to get noticed.

1 Now, you did hear from one other
2 coach, Stan Hixon, and Stan Hixon -- strike
3 that. I'm getting my coaches mixed up. You
4 did hear from on other coach, Coach Ernest
5 Wilson. Coach Wilson was a coach at Savannah
6 State, and his deposition testimony was read to
7 you during the course of these proceedings.
8 When Coach Hixon -- I keep going back to Hixon,
9 don't I? When Coach Wilson was asked about the
10 hiring prospects of Mr. McQueary, Coach Wilson
11 testified that his athletic director would not
12 permit him to hire Coach McQueary. When asked
13 what was it that prevented you from hiring Mr.
14 McQueary, Coach Wilson testified that his
15 athletic director was concerned about
16 distractions. And when I asked Coach Wilson
17 what he meant by distractions, he responded, by
18 hiring Mike McQueary, the media attention would
19 be all about Mike McQueary. Coach Wilson
20 testified the media attention needs be on the
21 head coach, the head coach and the new football
22 program that he is putting in place. There is
23 no testimony on this record that either Coach
24 Rhule or Coach Wilson based their decision to
25 not hire Mr. McQueary -- there is no evidence

1 to establish that it was based on any actions
2 that Penn State took. It was based on concern
3 for the media and it was based on a decision
4 that Mr. McQueary did not possess the
5 qualifications that Coach Rhule was looking for
6 on his staff.

7 Now, I also want to briefly make
8 reference to this binder, this binder that, I
9 believe it was plaintiff's economic expert
10 testified to, contained over 600 pages of Mr.
11 McQueary's job efforts, but again let's
12 reconsider the testimony of Pete Roussel, Pete
13 Roussel, who said, whatever the job, it's not
14 enough -- it's not enough to send out a resume,
15 to respond to an ad on Monster.com. You don't
16 get jobs through Monster, through sending a
17 resume. You get jobs by taking the extra
18 effort, by doing the follow-up, and I will
19 present to you that the evidence establishes
20 that that follow-up that Pete Roussel described
21 is simply not contained but for a few
22 exceptions in this binder of some 600 pages.

23 And with reference to the economic
24 experts, you have heard about a lot of numbers,
25 and if you get to damages, you might have to

1 deal with those numbers, but I want you again
2 to think about the two who testified,
3 plaintiff's expert, who had eight scenarios,
4 who talked about 20 years and acknowledged that
5 it would be speculative to consider that long
6 of a time period, especially if plaintiff had
7 not conducted a meaningful job search, versus
8 Dr. Kursh, who you have you heard from, whose
9 first and foremost scenario established that
10 Mr. McQueary's losses in this case were zero,
11 and the reason that they were zero was because
12 Mr. Kursh testified that plaintiff's damages
13 are zero because, based on the conclusion that,
14 when Coach Paterno departed as head coach, Mr.
15 McQueary's career in coaching was over. It was
16 over, as Pete Roussel explained, because Mr.
17 McQueary had not developed that network, had
18 not developed that resume to get noticed.

19 The evidence has established that Mr.
20 McQueary is simply not entitled to any damages
21 under any of the claims that he has asserted in
22 this case. He has not developed the contacts
23 or a national reputation to land a job in the
24 field of football. He has not done a
25 meaningful job search in order to obtain a

1 position outside of the field of football, yet
2 Mr. McQueary wants you, you, to hold Penn State
3 responsible for his failures. The testimony
4 does not support such a claim.

5 The evidence that you heard, that you
6 saw, has established that any harm that Mr.
7 McQueary alleges, including any injury to his
8 reputation, is the result of -- not as a result
9 of Penn State, but the result of Mr. McQueary.
10 The evidence has established that Mr.
11 McQueary's alleged harms are the result of his
12 own failures, his own failures to act, his
13 failure to distinguish himself in professional
14 college football, his failure to build a
15 network that he could rely on to connect for
16 future job opportunities, his failure to act
17 that night in February 2001, and the national
18 media reports that followed that incident. In
19 the words of Mr. McQueary, his own words, any
20 harm that he alleges are a result not of the
21 actions of Penn State, but in the words of Mr.
22 McQueary, as he said to the Office of Attorney
23 General, it is national media and public
24 opinion that has totally, in every single way,
25 ruined me. It is not the actions of

1 Pennsylvania State University, and, as you
2 consider the claims of defamation, of
3 misrepresentation, I ask you to consider all of
4 the evidence, the evidence that establishes
5 that the Spanier statement is not defamatory.
6 The statement does not refer to Michael
7 McQueary, and the statement in which there is
8 no evidence that any head coach, prospective
9 employer, has testified to you that that
10 prevented them from hiring Mike McQueary. And
11 the misrepresentation claim, I ask you to
12 carefully consider the elements of that claim
13 and determine whether there were any
14 misrepresentations or, if, as Mr. McQueary
15 himself testified, that Mr. Curley and Schulz
16 informed him that they took the matter
17 seriously, they would see that it was properly
18 investigated and take appropriate action, and
19 that as Mr. McQueary then testified 10 days
20 later, informed him that they followed up and
21 took action on that matter. There is no
22 misrepresentation, and on that basis, I will
23 ask you with respect to all of the evidence
24 that you will consider, to find in favor of the
25 Pennsylvania State University because Mr.

1 McQueary has failed to meet his burden to prove
2 to you a defamatory statement or a
3 misrepresentation.

4 Thank you for your attention. Thank
5 you for your diligence. Thank you for your
6 service.

7 THE COURT: Members of the jury, we're
8 going to take 15 minutes to give the reporter a
9 break, and then we will pick it up with
10 plaintiff's closing.

11 (Recess)

12 THE COURT: Go ahead and be seated,
13 everyone, please. Again, members of the jury,
14 you are now going to hear plaintiff's closing,
15 obviously arguing the facts and the law in a
16 manner that favors the plaintiff's side.
17 Again, give it the same consideration that you
18 gave to Ms. Conrad's discussion, and go ahead,
19 Mr. Strokoff.

20 MR. STROKOFF: Thank you, Your Honor.

21 I, too, would like to thank you all
22 for your attention that you have given to this
23 trial and the evidence that has been presented
24 to you, and I'm going to try to, as best I can,
25 tie it all together.

1 In nine days, it will be five years
2 since President Spanier's statement was issued,
3 five years. Mike McQueary has been living
4 under a very dark cloud for those five years.
5 Your primary function, as the judge, I believe,
6 has already indicated to you, is to determine
7 credibility of witnesses, because not every
8 witness here has said the same thing. To some,
9 it might be mistake of memory. Others, it
10 might be just an outright lie. But there are
11 two falsehoods which permeate this trial.
12 Throughout the trial, we heard about multiple
13 death threats against Mike McQueary, and in Ms.
14 Conrad's closing, she again referred to
15 multiple death threats against Mike McQueary
16 and that is the justification for placing him
17 on administrative leave.

18 There is no evidence in this trial to
19 support that position; that there were multiple
20 death threats against Mike McQueary. The head
21 of the Pennsylvania State Police, Mr. Shelow
22 (phonetic), was here, I think Tuesday, maybe
23 Wednesday, and he could only testify and
24 validate one complaint, and it was placed on
25 the Penn State police website, where a guy from

1 Melbourne, Florida said words to the effect of
2 I could shoot Mike McQueary. So it was on
3 their website. They contacted the police
4 department down in Melbourne, Florida, and as
5 soon as they got a hold of the right police
6 department -- I think he said it was the
7 Broward County Sheriff's Department -- they
8 said we know that guy; he's a hothead, and they
9 went out and spoke to him, and then that was
10 the end of that, and there wasn't even a
11 criminal complaint filed. That is the only
12 evidence with respect to multiple death
13 threats.

14 There is another deviation or
15 falsehood, and that is when the folks who
16 participated in drafting the Spanier statement
17 knew that Mike McQueary was the grad assistant
18 who had reported what he had reported, and some
19 people said, oh, I don't know if it's
20 Wednesday, Thursday, you know. Really
21 everybody had something more important to do.
22 The evidence is clear that, when the
23 presentment was announced and released
24 officially Saturday morning and it referred to
25 a grad assistant who witnessed Jerry Sandusky

1 and the boy, within less than 24 hours the grad
2 assistant was identified, and references were
3 made during testimony to a posting on the web
4 at 6 a.m. on the 6th, the grad assistant is
5 Mike McQueary, and a few hours later, another
6 posting that the Patriot News is reporting that
7 the grad assistant is Mike McQueary, and then
8 two o'clock or so in the afternoon, another
9 newspaper identifies the grad assistant as Mike
10 McQueary, and, in fact, it wasn't that hard to
11 do, because Penn State only had a couple of
12 grad assistants in 2001, and it wasn't too hard
13 to figure out who that grad assistant would be,
14 and there was only one Penn State witness who
15 acknowledged that he found out and he knew, and
16 this is Kirk Diehl on Sunday the 6th, that it
17 was Mike McQueary.

18 There also is, I think, some pretty
19 darn good circumstantial evidence that key
20 players who put together the Spanier statement
21 knew ahead of time that Mike McQueary had
22 reported what he had seen to the Attorney
23 General's investigators and that Mr. Curley and
24 Mr. Schulz, when they were interviewed and then
25 went down to the grand jury, were asked

1 questions, "Didn't Mike McQueary tell you this
2 and didn't Mike McQueary tell you that about
3 the incident?" As is clear, and there is no
4 doubt about this, while grand jury proceedings
5 are secret, witnesses themselves are free to
6 divulge what they testify to. There is no
7 question about that. The judge tells you that
8 when you come there to testify, and indeed
9 Cynthia Baldwin verified that, that Curley and
10 Schulz received that instruction from the grand
11 jury presiding judge.

12 So, when they went down in January of
13 2011, and they were asked questions about Mike
14 McQueary and what did he tell them, they were
15 free to tell whoever they wanted. Graham
16 Spanier said, "Well, they didn't tell me,
17 because we had respect for the process." He is
18 really asking you to believe a lot there,
19 especially when he gets called down to the
20 grand jury two months later and, you know, I
21 think if I were getting called before the grand
22 jury and I had two immediate subordinates who
23 had been down there a couple months before, I
24 would ask them what's the process? What
25 happened? What questions did they ask you? so

1 I can be prepared. He says, out of respect for
2 the process, we didn't talk about it, but
3 Cynthia Baldwin, the general counsel for Penn
4 State, she went in with Curley and Schulz. She
5 knew that they were asked questions about Mike
6 McQueary, and while she said that, because she
7 was a lawyer, she didn't feel comfortable
8 divulging what Curley and Schultz said, she
9 gave an affidavit to the board of trustees in
10 May of 2011, saying that the witness are free
11 to divulge.

12 So we come to October 28, 2011, when
13 Cynthia Baldwin gets advance word that a
14 presentment is coming down, not only against
15 Mr. Sandusky, but against Mr. Schulz and Mr.
16 Curley, and then Graham Spanier drafts a
17 statement in anticipation of this, a statement
18 which he acknowledges to not say anything about
19 the children. So then he puts together two
20 sentences, which are supposed to show support
21 for the children, and Bill Mahon, the Penn
22 State Vice President of University Relations, I
23 think is his title, and Lisa Powers, the
24 Director of Public Information, the two high-
25 ranking PR people, and Cynthia Baldwin take

1 look at this statement, and Mr. Garban, the
2 chairman of the board, comes in and looks at
3 the statement and they say it's fine, let it
4 go.

5 Now, during that week, there was
6 testimony Cynthia Baldwin sent the draft
7 statement to the lawyer for Mr. Curley for her
8 input, and she forwarded it to the lawyer for
9 Mr. Schulz for his input, and on November 5,
10 2001 -- I'm sorry, November 5, 2011, they
11 issued a statement, and a few hours after the
12 statement is issued, the supporting comments
13 from the lawyers are added to the Penn State
14 Live website, the Penn State Live website that,
15 with a click here and a click there from a
16 viewer, can send this statement all over the
17 world, Facebook, Twitter. There was testimony
18 that Reuters picked up, which is an
19 international news service. Reuters picked it
20 up. ESPN picked it up. CBS picked it up.
21 Within a very short period of time, this
22 statement, with the lawyer's supporting -- or
23 comments, with the lawyer's comments,
24 distributed on November 5, 2011, out into the
25 public domain intentionally -- this is the way

1 this website is designed -- and it is out there
2 forever. It is out there forever.

3 Ms. Conrad keeps making the point that
4 what the statement says is, "I am confident the
5 record will show that these charges are
6 groundless and that they conducted themselves
7 professionally and appropriately." She keeps
8 emphasizing the record will show. Well, it is
9 five years. What record? The sense of that
10 statement is these charges are groundless.

11 Now, the judge will instruct you about
12 context and circumstances and things like that,
13 but please focus on the Plaintiff's Exhibit 39,
14 the statement with the lawyer's comments, for a
15 couple reasons. At the top, in the opening
16 paragraph, it says the allegations about a
17 former coach are troubling, and it's
18 appropriate that they be investigated
19 thoroughly. There is no such statement about
20 the allegations against Curley and Schulz. The
21 charges are groundless. The lawyers for Curley
22 and Schulz, they didn't have the gall to say
23 the charges are groundless. They didn't say
24 the charges are groundless. They said our
25 clients will be found innocent, but there is a

1 difference between somebody is going to be
2 found innocent and the charges are groundless.
3 Nobody, not Dr. Spanier, not Cynthia Baldwin,
4 not Lisa Powers, Bill Mahon, or Steve Garban
5 read the presentment before this thing was
6 released and put out there forever. So this
7 statement was saying these charges are
8 groundless without knowing what the charges
9 were.

10 If there ever was a reckless
11 indifference to the truth, this is it. This is
12 a record holder. When you look at papers,
13 pages 12 and 13 of Plaintiff's Exhibit 35, it
14 is very clear that Tim Curley is accused of
15 lying to the grand jury when he testified that
16 he was not told by the graduate assistant that
17 Sandusky was engaged in sexual conduct or
18 having sex with a boy in the restroom or
19 showers; that he lied when he said he wasn't
20 told by the grad assistant. There is a similar
21 allegation against Mr. Schulz. Mr. Schulz
22 lied. The grad assistant did not tell him that
23 there was sexual misconduct, and I put it to
24 Dr. Spanier, how in the world can the charges
25 be groundless unless the grad student committed

1 perjury, unless the grad student lied to the
2 grand jury about what he reported? And he had
3 to concede that that was true. He said he
4 never thought of it that way, but he conceded
5 you can't reconcile groundless with the grad
6 assistant telling the truth. And frankly --
7 and I know what Ms. Conrad said Dr. Erickson
8 said -- my recollection is Dr. Erickson
9 essentially said, well, I didn't think of it
10 that way, but I guess you can't reconcile it,
11 because you can't. It can't be reconciled. If
12 the charges are groundless, then the grad
13 student lied, and the grad student is Mike
14 McQueary. And if you lie before a grand jury,
15 that is perjury, and under the law, as Judge
16 Gavin will instruct you or as I think he will
17 instruct you, that's defamation, and that's
18 defamation per se, and that is why Mike
19 McQueary is entitled to damages with respect to
20 the defamation count. I will talk a little bit
21 more about that later on.

22 The football program at the
23 Pennsylvania State University is, quote, "An
24 indispensable source of pride -- and revenue --
25 for the university," end quote. Elliott

1 Strokoff did not say that. Graham Spanier said
2 that, and he admitted that when he testified.
3 The football program is an indispensable source
4 of pride and revenue for the university.

5 On November 5, 2011, with the
6 statement from President Spanier, my client was
7 vilified by the university. He was made the
8 villain. Think about it. He was made the
9 villain. The day after the 2001 -- the
10 February 10, 2001, the day after he told Coach
11 Paterno what he had seen on a Sunday, and Gary
12 Schulz called the university lawyer on a Sunday
13 and asked a question, which was recorded, and
14 this is was recorded -- and I don't want to
15 misquote it, 2/11/01, conference with G.
16 Schultz re: reporting of suspected child abuse;
17 conference with G. Schulz." So whatever Coach
18 Paterno told Gary Schulz prompted Gary Schulz
19 on a Sunday to obtain legal advice, and Wendell
20 Courtney testified as to the legal advice he
21 gave. It is really very simple, report it to
22 DPW. Do not forget now, Schulz and Curley had
23 not spoken to Mike McQueary. Schulz and Curley
24 had gotten a report from Joe Paterno, so it is
25 hearsay once removed, but the law is clear. If

1 there is suspected child abuse or possible
2 child abuse, just report it. It's the smart
3 thing to do, but the football program at Penn
4 State is an indispensable source of pride and
5 revenue for the university, and it wasn't
6 reported, and there are no ifs, ands, or buts
7 about that. There is no evidence that it was
8 reported.

9 The next day, February 12, 2001,
10 former Penn State Police Chief Harmon
11 (phonetic) testified. He sent an e-mail to
12 Gary Schulz. He said, likely in response to a
13 telephone inquiry, because it wasn't in reply
14 to an e-mail, and in the e-mail he says,
15 "Regarding the incident in 1998 involving the
16 former coach, I checked, and the incident is
17 documented in our imaged archives." So, in
18 1998, the incident records are stored on some
19 software or computer disk somewhere.

20 So Schulz, as of February 12, knows
21 that the 1998 incident is stored in the
22 archives. His lawyer has said report it, so
23 what does Schulz do? Take a look at
24 Plaintiff's Exhibit 7, a confidential memo
25 which he wrote. His handwriting was identified

1 by Wendell Courtney and his former
2 administrative assistant or secretary, Joan
3 Coble. He wrote: Talked with TMC, Timothy
4 Mark Curley, reviewed 1998 history, agree TMC
5 will discuss JDP (phonetic) and advise they
6 think TMC should meet with JS on Friday.
7 Unless he confesses to having a problem, TMC
8 will indicate we need to have DPW review the
9 matter. So, as of February 12, they knew that
10 DPW should be notified, but they wanted to use
11 that as some kind of bargaining chip to get
12 Jerry to admit he had a problem.

13 Plaintiff's Exhibit 10, one of those
14 e-mails, single-spaced. It's about 15 lines,
15 not easily read. However, it begins on
16 February 27, 2001, Tim Curley wrote: I'm
17 having trouble going to everyone but the person
18 involved. I would be more comfortable meeting
19 with the person first, tell him we're aware of
20 the first situation, tell him about the
21 information we received, and indicate we feel
22 there's a problem. They have not investigated
23 anything. We want to assist the individual to
24 get professional help. We also feel
25 responsibility at some point soon to inform his

1 organization, the Second Mile, and maybe, maybe
2 the other one, DPW. Later that evening, two
3 hours later, Graham Spanier e-mails back to Mr.
4 Curley, and Mr. Schulz is getting it as well:
5 This approach is acceptable to me. It requires
6 you to go a step further. Then he goes on to
7 say later: The only downside for us is if the
8 message isn't heard and acted upon, and we then
9 become vulnerable for not having reported it.
10 So, on February 27, 2001, there is recognition
11 of vulnerability if we don't report this to
12 DPW.

13 Prior to this, that is, after the
14 February 12, 2001, confidential memo, Mr.
15 Curley and Mr. Schulz met with Mike McQueary,
16 and Mike McQueary told them explicitly about
17 the sexual misconduct he had witnessed, and
18 they told him this is serious, we will see it
19 is investigated and appropriate action taken.
20 There's absolutely no evidence that there was
21 ever any investigation. There is no evidence
22 there was any report made to anybody. Tom
23 Harmon testified that, as police chief of the
24 Penn State University police force, he received
25 no report about a 2001 incident. Tony Sassano

1 testified that he went around to all the
2 agencies and police departments and found no
3 evidence that he reported it. So Curley and
4 Schulz did not tell the truth when they met
5 with Mr. McQueary in mid-February 2001, and
6 they said we will see it's investigated. In
7 fact, they did just the opposite. There was no
8 investigation, not by anybody.

9 At the time -- I think you get it now.
10 You might not have gotten it when we began
11 trial. Mr. McQueary was a graduate assistant,
12 and from all the football folks that were
13 testifying, I think you can understand where
14 you are on the totem pole in a football program
15 when you are a grad assistant. He trusted Mr.
16 Curley. He trusted Mr. Schulz, who oversaw the
17 police department. They said they were going
18 to investigate it. They said they were going
19 to take appropriate action. They told him what
20 action was being taken. But assume that an
21 investigation had been conducted, and to people
22 who are smarter than he is and have a much
23 higher pay grade than he does, this was
24 appropriate action. It wasn't until the Freeh
25 report came out in July of 2012 that we saw

1 these documents that show that his report of
2 this incident wasn't investigated. It wasn't
3 reported to DPW, and that folks who the law
4 entrusts to investigate these things and make a
5 determination were not involved, which is
6 especially compelling, because in 1998, outside
7 agencies were involved. DPW was involved. The
8 Penn State Police Department was involved.
9 There was a conscious decision in February 2001
10 not to let this thing go to any outside agency.

11 As judges of credibility, you get to
12 determine, as I said before, what the truthful
13 testimony is, what the proper evidence is. I
14 don't think I have to spend too much time
15 suggesting to you what a credible witness my
16 client was. His testimony, his demeanor, and
17 the way he handled himself speaks for itself.
18 As an aside, he happens to be a good coach, a
19 very good football coach, and nobody has said
20 otherwise. Ganter, Sherburne, Bradley, Diehl,
21 Caldwell all said he was a good coach. Nobody
22 said he wasn't a good coach. Now, Roussel said
23 he didn't have -- I never heard of this before
24 about a coach -- the wow factor. You know,
25 maybe he is not a good marketer, but if you

1 look at the Penn State media guide, he had a
2 kicker and a number of wide receivers that he
3 coached in the NFL. To me, that is a wow. He
4 had only been a coach eight years, and already
5 he had four or five of his players in the NFL,
6 but I'm just a lawyer, but Roussel certainly
7 didn't say that he wasn't a good coach.

8 But much more important than that is
9 that he is an incredibly decent and good
10 person. I might be dating myself, but he is
11 really the salt of the earth. He is as honest
12 as the day is long, and, on November 5, 2011,
13 his whole world was turned upside down.
14 Remember the defendant called Caldwell and
15 Diehl to testify that, when they read the
16 Spanier statement, they didn't connect it to
17 Mike.

18 Now, I asked them, when did you read
19 it? Oh, a couple weeks ago. The statement was
20 issued five years ago. These two at-will
21 employees at Penn State were brought in to
22 testify that they didn't connect it almost five
23 years later, but even more significant, they
24 could not connect it because they hadn't read
25 the presentment. They had not read the

1 presentment.

2 Now, I agree with Ms. Conrad that most
3 people, most people, not 100 percent, but most
4 people are not going to take the presentment
5 and the statement side-by-side and make a
6 comparison, but a lot of people are, and the
7 media do, and the media, after a few days,
8 started questioning Mike's credibility, and
9 people started questioning Mike's credibility.
10 Credibility, to all of us, is important. Every
11 single person in the world, not just in this
12 community or in Pennsylvania -- credibility and
13 reputation for honesty is incredibly important.

14 There is an additional -- well, when
15 you are a football coach, and really any
16 athletic coach, because, when you are
17 recruiting student athletes to come to your
18 school and you're going to high schools and
19 you're going to the parents of high school
20 students, they have got to trust you. When you
21 tell them that we have an academic program
22 where your daughter can play here or your son
23 can play here at this level and everything,
24 they have to trust you. As John Parry said,
25 who has been an athletic director for 33 years,

1 almost as long as Mr. Roussel has been alive,
2 as he said, when you have got all this
3 competition out there for jobs, assistant
4 coaching jobs, if there is any cloud, an
5 athletic director is going to say forget about
6 it. Get somebody else, and that is what
7 happened at Savannah State.

8 You had a coach, and I realize, when
9 we read these depositions into the record, they
10 are not as attention grabbing as when you have
11 a video, but he said I was taking advantage of
12 Mike's situation. I was getting a first-class
13 coach at a bargain price, and Mike testified he
14 was willing to work in June of 2013 and into
15 July of 2013 as an assistant coach at Savannah
16 State for \$1,200 a month for a four-month
17 season, plus that apartment. That is how bad
18 he wanted to get back into coaching, and he got
19 the job, and then, two weeks later, Coach
20 Wilson had to retract the offer because his AD
21 said no, just exactly what John Parry said
22 would happen. ADs, athletic directors, why
23 take a chance? Get somebody else.

24 Both Brad Caldwell and Kirk Diehl,
25 during their testimony, were unabashed an

1 unashamed about their high regard for Mike
2 McQueary. It was very moving testimony, and
3 the defendant put them on. When a defendant
4 puts on a witness, they own the witness. Brad
5 Caldwell testified, if you recall, that when he
6 heard Mike wasn't going to be coaching the
7 Nebraska game at the end of the day Thursday,
8 November 10, he went to his vehicle and he
9 cried. He cried for Mike. Kirk Diehl got
10 emotional a number of times about a lot of
11 things, but sometimes he got emotional during
12 his testimony, talking about Mike, and both of
13 them said and referred to a conversation in the
14 lunch room one day, or it was at the lunch
15 table in the equipment manager's office, about
16 reporting a serious violation, and Mike made a
17 reference that I reported something to JoePa
18 that was devastating and was life-altering or
19 something like that, and they both said we
20 thank him every day for not having told us
21 because we didn't want to have to bear the
22 responsibility of that information. And they
23 both said, something serious, you report it to
24 JoePa.

25 One of the things that has never been

1 explained about the Spanier statement is that
2 the draft that Cynthia Baldwin sent to Caroline
3 Roberto (phonetic) did not contain the
4 groundless phrase. The draft that was sent to
5 Caroline Roberto just said, "I'm confident that
6 the record will show that they acted
7 responsibly," or something like that. Nobody,
8 not Spanier, not Mahon, not Baldwin, not
9 Powers, and certainly not Garban, have
10 explained how the groundless language got put
11 in, but it sure got put in. This statement was
12 a deliberate statement drafted and vetted over
13 a period of eight days, and aside from the fact
14 that you had two high-level PR people involved
15 in reading it, Graham Spanier was the primary
16 drafter, and Graham Spanier, you will recall,
17 had written 10 books and over 90 published
18 articles, so Graham Spanier knows how to write.
19 He knows how to convey what he wants to convey.
20 So, when he says, "I never thought of that. I
21 never thought that the only way that charges
22 could be groundless is if the grad assistant
23 was lying," is more than a little suspect. But
24 getting back to that statement, that statement
25 has been up there for -- it is going to be five

1 years. It could have been retracted. It could
2 have been withdrawn, but the university didn't
3 do so.

4 Mr. Garban -- you will recall his
5 testimony. When I said, "Did you read the
6 presentment?" and his answer was, "It doesn't
7 matter." It didn't matter. Two of our guys
8 were being charged criminally, we're going to
9 circle the wagons and we're going to defend
10 them. It doesn't matter what the charges are.
11 That's a big problem here. That's the big
12 problem. Graham Spanier said, "Well, we didn't
13 talk about the grand jury testimony out of
14 respect for the process." Well, the process
15 resulted in criminal charges being leveled
16 against Graham Spanier -- I'm sorry, against
17 Mr. Curley and Mr. Schulz -- and instead of
18 respecting the process, issued a statement, and
19 what does the statement not say, because Ms.
20 Conrad keeps saying, well, it's just an
21 expression. Graham Spanier testified that,
22 underlying the opinion, which wasn't disclosed,
23 was the fact that, in 2001, he recalled that
24 Curley and Schulz had reported to him that
25 there was just horseplay. That was underlying

1 an undisclosed fact, underlying what he says is
2 the reason why he issued such a first step and
3 he agrees to it. He did not go to Curley and
4 Schultz and say what did you guys say to the
5 grand jury that would result in perjury
6 charges? Apparently, to this day, he has never
7 asked them.

8 Now, if Graham Spanier had such
9 respect for the process, he wouldn't have
10 issued a statement like this. Quite frankly,
11 Cynthia Baldwin, who was a former Deputy or
12 Assistant State Attorney General herself, you
13 would have thought that her former colleagues
14 are prosecuting this matter, that she would at
15 least waited, said let's read the presentment,
16 but the highest levels of the university, the
17 last week of October 2011, five years ago,
18 thought that, knowing what the charges were, it
19 doesn't matter.

20 Ms. Conrad said that the only
21 witnesses we presented were Tony Sassano and
22 Jonelle Eshbach to say this was defaming Mike,
23 because Mike is their star witness, not just
24 against Sandusky. He has already testified
25 against Sandusky. Sandusky has been convicted,

1 but he is the star witness against Curley and
2 Schulz. Sassano and Eshbach not only read the
3 presentment, but they wrote the presentment.
4 They signed the presentment. They knew what
5 was in the presentment, so they knew instantly
6 what it was. But I think we all know that
7 there are plenty of people out there with a lot
8 of time on their hands that would have pulled
9 up the presentment and would have taken a look
10 at what the presentment said and taken a look
11 at the statement, and that is where I think you
12 would have gotten the wow factor.

13 Sassano and Eshbach both testified, by
14 the way, as you recall, that there was no
15 credible threat to Mike's physical safety.
16 Mike testified that he didn't regard these
17 threats as being a serious threat to his
18 physical safety, but they were saying bad
19 things about him. They were calling Jerry
20 Sandusky his pedophile friend. They were
21 accusing him in the very first Defense Exhibit
22 entered in this case, Defense Exhibit 35 -- is
23 an e-mail from somebody to Mike, saying, "We
24 are posting your name on our website as
25 somebody who helped cover up the scandal," Mike

1 McQueary, the one guy who reported it, and it
2 wasn't by him. At the trial, in her closing
3 document, Ms. Conrad continues to vilify Mike
4 McQueary. The reason why he can't find work is
5 due to his own failures. Nobody says if, on
6 February 11, 2001, Gary Schulz had simply done
7 what his lawyer said to do, report it, none of
8 this would have happened. But Gary Schulz is
9 not the villain. The university, in the
10 statement, they are still standing foursquare
11 behind him and Mr. Curley. He is the villain.
12 He is not searching for work properly. He is
13 not using his connections properly.

14 Plaintiff's Exhibit 79 is replete with
15 e-mails from Mike to other individuals in his
16 network, asking them, "Do you know somebody at
17 Duke? Do you know somebody at LSU? Do you
18 know somebody here?" He had a network. It
19 might not be an enormous network, but he had a
20 network. But, as John Parry said, when the
21 university puts a cloud on Mike McQueary the
22 way it did on November 5, 2011, and then
23 emphasizes it by telling him he can't coach the
24 Nebraska game and then the very next day
25 placing him on administrative leave, that's

1 sending a very clear signal to the folks in
2 your network that the university doesn't want
3 you supported. The university is not
4 supporting you. The university is, "All right.
5 We will pay you, but stay away. Stay away.
6 You're a non-person." Their actions after they
7 issued the statement manifests their malice and
8 their intent to isolate Mike McQueary.

9 And John Parry testified that, when
10 you do something like this, especially
11 administrative leave, you are putting a
12 chilling effect on those in your network, and
13 look at Matt Rhule, the coach of Temple. He
14 admitted that, when Al Golden a number of years
15 ago was named head coach at Temple, he knew
16 that Mike McQueary knew Al Golden, and he
17 called Mike and said, "Will you call Al Golden
18 for me? Tell him that I'm a good guy and a
19 good fit." And Mike did, and Matt Rhule got a
20 job as an assistant coach at Temple, and we are
21 not claiming that, if Mike had not made the
22 call, he would not have gotten the job. I
23 mean, we don't know, but we know that, when
24 Matt Rhule asked him, would you make the call,
25 he did. Matt Rhule played football in high

1 school with Mike. He was Mike's center. Mike
2 was the quarterback. Matt Rhule was the
3 center. So when Mike was on the field, they
4 had contact each play, and in college they
5 played on the same team, and Matt Rhule
6 testified that they kept in touch over the
7 years. He used the term networking. We would
8 network, and I would see him at conventions.
9 You know, Roussel said no, he didn't network.
10 Matt Rhule testified we would network, so we go
11 ahead to December of 2012, December of 2012.
12 Steve Addazio, who had been the head coach at
13 Temple and Matt was one of his assistants,
14 takes a job with Boston College. So Mike, and
15 there's a text message to this effect, sends
16 Matt Rhule a text message, "I could use a call
17 to Addazio or to Steve." And Rhule texts back,
18 "I'll call tonight." And then the next day he
19 says, "I fell asleep. I will get a hold of
20 him," and then he sends another text, "Spoke to
21 Steve or Addazio," and it's all there. And at
22 his deposition, did you call Addazio for Mike?
23 "I'm not sure." You know, he didn't remember a
24 lot at his deposition.

25 I said, "You would have sent this e-

1 mail saying you spoke to him. You were going
2 to speak to him. You spoke to him and you
3 didn't. That's a possibility?" "Yeah, that's
4 a possibility." That is what happens when the
5 university makes it clear that he is the
6 villain, and if you are part of the Penn State
7 nation, as Dr. Spanier and I think perhaps Mr.
8 Jontra (phonetic) said, there's 600,000 Penn
9 State alumni, not just in this country, all
10 over the world, something like 160,000 paid
11 alumni association members. That's a mighty
12 big nation to have lined up against you, and
13 I'm not saying everybody is lined up against
14 him, but, you know, if you are in his network
15 and he reaches out for help, and this is
16 somebody he has known since high school, so
17 this has never been about Matt Rhule should
18 have hired Mike or O'Brien should have hired
19 Mike. Mike asked. He said no. That is a head
20 coach's prerogative. O'Brien -- never got a
21 shot, another slap in the face. It's a
22 courtesy, but the other assistant coaches who
23 are not going to be retained likely, they get
24 the courtesy, but Mike McQueary doesn't, again
25 showing the malice of the university.

1 There was a bomb scare Friday night,
2 November 11, after nine o'clock, Beaver
3 Stadium. Somebody called in a bomb scare. It
4 was about 20 hours after there is a public
5 announcement that Mike is not going to coach
6 the Nebraska game. It is about five hours
7 after this press conference saying that Mike is
8 on administrative leave, so, after nine that
9 night, there's a bomb scare. That has got
10 nothing to do with Mike McQueary, unless
11 they're arguing that somebody called in a bomb
12 scare because they put Mike on administrative
13 leave. That is not what they're arguing. They
14 are arguing that they had some kind of safety
15 justification, and they put in some e-mails and
16 stuff that happened afterwards, as long as a
17 week or two afterwards. It has got nothing to
18 do with their justification for placing him on
19 administrative leave, which as John Parry said
20 makes no sense. I suppose there is some
21 concern about some fans being upset if Mike is
22 on the field Saturday for the Nebraska game.
23 So he's not on the field. Or maybe you don't
24 even have him up in the box, but as John Parry
25 said and nobody disagreed, during football

1 season, assistant coaches work at least 70
2 hours a week. Game day, it's four or five
3 hours. There's a lot of work to be done, a lot
4 of work to be done. Unfortunately, the staff
5 was already down one coach, Joe Paterno. Now,
6 by taking Mike out of the mix, they are down
7 two coaches, and Tom Bradley testified, "I
8 didn't want that. I wanted Mike on the field,
9 calling in signals on Saturday," and when
10 Rodney Erickson issued his press -- or said in
11 his press conference on Friday afternoon at
12 four, concerning administrative leave, words to
13 the effect it became obvious that Mr. McQueary
14 could not function in his role any longer, Tom
15 Bradley said he didn't get that from me.
16 Nobody said he couldn't function in his role
17 any longer.

18 And let's go to the statement the
19 night before, because the defense pounded on
20 that. Mark Sherburne sends Mike McQueary and
21 Tom Bradley an e-mail, words to the effect that
22 Tom Bradley and Mike McQueary have agreed that
23 Mike should not coach in the Nebraska game.
24 That wasn't true. They admitted it. It was a
25 lie. So Mike, who had an attorney for a year

1 now, from when he went down to testify before
2 the grand jury and cooperate with the police,
3 Tim Fleming, and Tim had the sense to try to
4 get a PR guy to look at this thing, and so what
5 came out of it is the truth as Penn State saw
6 it, because Mark Sherburne had said, well, the
7 reason for this is due to multiple threats, so
8 they would say it. This wasn't like, you know,
9 making something up like Penn State makes
10 something up. Just say the truth. Penn State
11 University or Penn State has decided, so that's
12 what that press release said. Somehow Mike
13 McQueary is at fault for that, for saying, you
14 know, if you don't want me to coach, then it's
15 your decision. Just, you know, stand up behind
16 your decision.

17 Was there extra security at the game
18 Saturday? So what? That had nothing to do
19 with Mike McQueary. They have not shown any
20 reason for a need to place him on
21 administrative leave, especially that Friday.
22 I mean, they just told him he was going to
23 coach the Nebraska game the day before, but
24 they couldn't wait. Mike had been in and
25 around the football facilities at Penn State

1 since 1992. It's 19 years. He was put on
2 administrative leave, off-limits to everything
3 associated with the football program. Remember
4 how he testified how galled he was. Jerry
5 Sandusky, after 2001, when supposedly he wasn't
6 supposed to bring kids into the facilities, he
7 continued to use the facilities and bring kids
8 into the facilities up until the time he was
9 arrested, but Mike McQueary is barred from the
10 football facilities. Five days before Mike
11 McQueary was placed on administrative leave,
12 Tim Curley was placed on administrative leave.
13 Tim Curley was accused of two crimes and was
14 placed on paid administrative leave without
15 restrictions, Graham Spanier said. There
16 weren't any restrictions. He never turned in
17 his car. He never turned in his phone. He
18 wasn't restricted from any areas, but not Mike,
19 and what does that signify just five days after
20 somebody's accused of a crime, being placed on
21 paid administrative leave, and you're put in
22 the same position?

23 Mike has testified, I think, with
24 dignity and discipline in trying to describe
25 cogently and without embellishment the pain

1 that he has endured the last five years. He
2 just celebrated his birthday a little over two
3 weeks ago, October 10, 42 years old. He loves
4 his parents, but he is living in the house that
5 he grew up in. He has the same bedroom that he
6 had when he was a kid, and notwithstanding all
7 these efforts to find work, and they include
8 not just coaching, but as he said, in these
9 other areas, pharmaceutical sales, medical
10 device sales, Rite Aid clerk, clerk in a golf
11 shop. These run the gamut. He cannot find
12 work.

13 Let's talk a little bit about the
14 experts, because the experts provided testimony
15 to help guide you in making your decision. On
16 vocation, we presented John Parry, an athletic
17 director for 33 years at three different
18 universities. It is true his current one
19 doesn't have a football program, but so what?
20 You know, you can have a university without a
21 football program. He has hired hundreds of
22 coaches, and he testified about hiring head
23 coaches, but most importantly, he has the
24 experience, having served on several NCAA
25 committees, some in an executive capacity for

1 years and years and years, to explain so that
2 you can understand that, if somebody comes to
3 you with a cloud, the athletic director is
4 going to exercise that rare veto and say get
5 somebody else. I don't care how good he is.

6 Mr. Roussel, and I don't want to
7 discriminate against the young, but he is 36
8 years old. On direct, it sounded like he had a
9 very impressive coaching career, and again, I
10 don't want to knock his credentials, but what
11 it came down to was one year as an assistant
12 coach and five years in a subordinate position
13 to an assistant coach, and after doing that for
14 six years or so, he decided he wasn't going
15 anywhere or he didn't want to do this anymore,
16 so he got into the website business, and, you
17 know, now he is a young agent, and he says, and
18 this is remarkable -- he says Mike McQueary's
19 career was over because the only place he
20 coached at was Penn State, Penn State, one of
21 the premier programs in the country. Now, it
22 is not like he was there three months. He was
23 there for eight seasons, again, produced people
24 in the NFL, but, you know, that is not really
25 the best sign of a coach. The best sign of a

1 coach is if you get somebody who might not have
2 all the physical tools, but you're able to
3 coach them so that they can perform at a higher
4 level, but, you know, he says his career is
5 over. That's ridiculous. Roussel also said he
6 didn't have a network, but Roussel also
7 admitted he didn't look at this.

8 Interestingly, what did Roussel say?
9 The most important thing is fit, F-I-T. What
10 did Matt Rhule say? The most important thing
11 is fit. O'Brien really said words to the same
12 effect. You know you have got the right fit if
13 you have worked with somebody before. That's
14 ideal. Sometimes you don't work with somebody
15 before. Matt Diehl testified he had a couple
16 people on his staff that he hired back in 2012,
17 and we are not saying again he should have
18 hired Mike, but he had some people on his staff
19 who he had not worked with before.

20 He did say -- and I don't know if you
21 remember this -- but he said, "I want an
22 assistant coach who his getting this job would
23 be the biggest day in their life." In other
24 words, he wanted an assistant coach where
25 coming to be an assistant at Temple would be a

1 big step up, and I believe he said big step up,
2 and for Mike, it would not have been a big step
3 up. He knew Mike was desperate. In fact, Mike
4 sent him two e-mails, "I'm desperate." He
5 said, "I don't know what Mike meant by that."
6 But nobody really criticized Parry's report.
7 All Roussel said is, "I disagree with his
8 conclusions." All Roussel said is, "Well, you
9 know, he doesn't have a fancy-enough resume,
10 you know, with graphics and stuff like that."
11 And maybe that's a valid criticism, but that is
12 not why he has not been hired.

13 Ms. Conrad says that Mike McQueary's
14 here because of his failures. Again, the
15 university continues to vilify him. Roussel
16 didn't say that. Roussel didn't say that he
17 can't find a job because of what he did or
18 didn't do on February 9, 2001. He said because
19 of the lack of network and he didn't have a
20 flashy resume. He also attached to his report
21 coaching changes, 2011-2012. Well, Mike wasn't
22 in the job market. As everybody has explained,
23 there is a high season for hiring coaches. It
24 starts November, ends maybe January, you know.
25 Mike is still on administrative leave, where

1 his employment status has not been determined,
2 so he is not really in the job market, so
3 Roussel uses this, uses the -- I forget what it
4 was -- 40 or 50 positions he could have applied
5 for in this window. You know, it is not a
6 valid year.

7 And when I said to him, "Well, what
8 about he didn't coach the Nebraska game?" He
9 said, "Well, it was for safety reasons," again
10 buying into their bogus death threats. So we
11 suggest to you that of the two experts who have
12 testified concerning Mike McQueary's vocational
13 possibilities and, in particular, the impact,
14 as John Parry said, of Penn State actions and
15 omissions, beginning with the Spanier
16 statement, have irreparably harmed his career.
17 Why? It's very clearly in his report. The
18 statement from President Spanier, which openly
19 questioned the truthfulness of McQueary's sworn
20 testimony, that was the basis for the charges
21 against Curley and Schulz. The meeting on
22 Monday, where Spanier told the athletic
23 deployment, standing foursquare -- he didn't
24 say foursquare -- we are standing fully behind
25 Curley and Schulz, and Ms. Conrad said, well,

1 you weren't there as an attorney. I wasn't
2 there. But remember how he said, "I reviewed
3 Spanier's deposition." Spanier testified at
4 his deposition about what happened at that
5 meeting and that he stood squarely behind the
6 folks. The decision not to allow McQueary to
7 coach on November 12 despite Coach Bradley's
8 desire and expectation that he would coach, and
9 then placing him on administrative leave,
10 effectively shutting Mr. McQueary off from his
11 network of coaches and athletic department
12 staff, sending the message again to them that
13 he was, quote, "persona non grata," end quote.
14 He must have done something. He wasn't to be
15 trusted. Again, fit.

16 Failure of Coach O'Brien to give Mike
17 a courtesy interview reinforces the notion that
18 Mike McQueary is persona non grata. In case
19 his network needed any more, two of his best
20 friends, Brad Caldwell, Kirk Diehl, at lunch
21 together, Mike, an assistant coach, the two of
22 them, one or two other people. Every day they
23 had lunch together, every day for 10 years.
24 Since November 11, 2011, nothing. An
25 occasional bump-in, an occasional bump-in.

1 Well, that's going to happen, but that is not
2 being seen together in a restaurant, having
3 lunch, or coming to Jim's -- is it Jim's, up
4 the hill?

5 Then we have the economic experts, Dr.
6 Kursh, a very personable guy, and James
7 Stavros. Dr. Kursh offered the opinion, "Well,
8 Mike's career is over as a coach," which is
9 what Roussel said, "And what Penn State did or
10 didn't do, beginning November 5, 2011, doesn't
11 matter," and Kursh has this idea that I guess
12 he got somehow from -- maybe from Roussel, that
13 assistant coaches follow the head coaches.
14 Well, that is not the evidence in this case,
15 because we have somebody like Stan Hixon, who
16 has never coached under Coach O'Brien before,
17 and Stan Hixon had eight or 10 coaching
18 positions in 30 years. He wasn't following the
19 same head coach. Matt Rhule wasn't following
20 the same head coach until he became head coach,
21 but Kursh says, well, the average work life of
22 a head coach is 6.4 years, so I'm only
23 estimating damages for six years. He admitted
24 he has no statistical justification or data
25 justification for cutting it off at six years.

1 Again, six years -- Mike at the time, five
2 years ago, is 37 years old. He had already
3 been at Penn State for eight seasons, so he
4 comes up with I can limit damages by cutting it
5 to six years. So this scenario number one is
6 zero. The scenario number two says, well, I'm
7 going to assume that Mike gets a job paying
8 \$76,000 a year, I think it is, in a smaller
9 university, for six years, no promotions, no
10 advancement, nothing. And then his scenario
11 number three says, well, I'm going to assume
12 that he gets a job paying what he was earning
13 at Penn State, which was one of Mr. Stavros'
14 scenarios, and when Kursh does that, he comes
15 up with \$590,000 damage for six years.

16 Now, Stavros, using the same basic
17 model -- remember Stavros has four different
18 models -- but using the one that assumes
19 140,000, but he says I'm going to -- even
20 though Mike says he wants to work till 67 or 70
21 -- I'm going to cap it at 62.76 because
22 statistically sometimes we're unable to work
23 for as long as we want to work for any number
24 of reasons. So, basically, he does it for
25 about another 20 years, and the basic numbers

1 that you plug in are the same except for the
2 length, so if you use Kursh's scenario number
3 three, say we're not going to get to six years
4 because that's ridiculous, you basically come
5 up with the same number that Stavros has in his
6 scenario. Let me get it right. I don't want
7 to mislead you here. The scenario number four,
8 that comes to 2.486 million. In other words,
9 about four times what Kursh has, because Kursh
10 cuts it at six years.

11 Mr. Stavros also did a scenario where
12 John Parry said that Mike looked like he was
13 going to be an offensive coordinator or head
14 coach in five to seven years, so Stavros says,
15 well, let's assume seven years, be
16 conservative, as an offensive coordinator, not
17 a head coach, and then he comes up with numbers
18 in the seven-plus million dollar range.

19 Stavros, who has a very detailed chart
20 of calculations, and Stavros, who reviewed all
21 of 79 -- remember Kursh said, "I didn't have
22 to. I didn't have to because Mike was deposed
23 and he was asked a lot of questions about his
24 job search effort." Well, Mike was asked a lot
25 of questions about his job search efforts, but

1 he wasn't asked about every single thing in
2 here. So I would suggest to you that, with
3 respect to the economic experts, James Stavros
4 is the one you ought to credit.

5 I want to talk to you now briefly
6 about punitive damages. The judge is going to
7 instruct you about punitive damages. In
8 addition to compensatory damages, which are
9 damages that are awarded to a plaintiff for the
10 harm she or he has suffered to make them whole.
11 The law allows, under certain circumstances, a
12 jury to award punitive damages to punish the
13 defendant, and the purpose of punitive damages
14 is not just to punish that defendant, but it is
15 also to deter others from doing the same thing.

16 What Penn State has done to Mike
17 McQueary is absolutely outrageous, not
18 investigating this report, then implying to him
19 that it was investigated and here is the action
20 that was taken, and this comes from, again, the
21 guy that supervises the police department at
22 Penn State and the head of the athletic
23 department. That is outrageous. It should
24 never, ever be allowed to happen again, and,
25 punitive damages against Penn State are a way

1 of making it clear that nobody in the
2 administration is going to be tempted to treat
3 an individual like that again, especially,
4 especially when she or he reports a matter this
5 serious, affecting other people. And the other
6 purpose of punitive damages is to deter others,
7 to deter other universities, to deter other
8 business owners. You can't do this. You can't
9 defame your employees, and Judge Gavin will
10 explain to you about defamation and innuendo;
11 that you don't have to name -- name, as Ms.
12 Conrad kept saying, his name isn't here, his
13 name isn't here, and Judge Gavin will explain
14 to you that if, you know, you can figure out
15 the circumstances who it is, then, you know,
16 that person is defamed. But the
17 misrepresentation warrants punitive damages.
18 The defamation warrants punitive damages. He
19 should not have been the scapegoat in this
20 matter and certainly not for five years, and
21 they continue today -- they continue to argue
22 that he is in court because of his failures.
23 He is the villain. He is the bad guy.

24 Judge Gavin will give you instructions
25 about compensating plaintiff if you find

1 liability for emotional distress, anxiety, et
2 cetera. Mr. McQueary has endured an awful lot
3 in silence, with dignity. You know, the
4 Attorney General's office said please don't
5 issue a statement, only they didn't say please.
6 You can't issue a statement, and he didn't. He
7 didn't do anything to jeopardize -- he hasn't
8 been out conducting press conferences or
9 whatever the case may be, maligning anybody.
10 This is his opportunity to testify and explain
11 what happened to him, explain what he has
12 undergone, and we believe, once you make your
13 determinations as to credibility, as to what
14 happened, that, if you follow Judge Gavin's
15 instruction, you will be awarding judgment on
16 both the misrepresentation and the defamation
17 claim in favor of Mr. McQueary. You will be
18 awarding not only compensable damages, but you
19 will be awarding punitive damages.

20 I thank you for your attention.

21 THE COURT: Stand up and stretch your
22 legs for a second, please. Members of the
23 jury, while you are taking your stretch, I
24 understand that lunch is here and that some of
25 you ordered hot items. If we take a break and

1 I charge, your hot items are going to turn into
2 cold items, so it might make sense for us
3 simply to break, let you eat lunch, and, when
4 you have had a reasonable time to eat lunch, we
5 will come back and I will give you my closing
6 set of instructions. I think that might make
7 sense. Can we see by a nod of heads which
8 direction we're going in? Okay. We're getting
9 the favorable nods, so what we're going to do
10 is we'll eat lunch, and hopefully the hot hors
11 d'oeuvres are still hot. Again, you're not in
12 a posture where you can decide anything until
13 you hear my instructions. Go ahead and step
14 out, and let's figure on a quarter of one.
15 That's reasonable time.

16 See you at a quarter till one.

17 (Luncheon recess)

18 AFTERNOON SESSION

19 THE COURT: Go ahead and be seated,
20 everyone, please. I don't normally write out
21 all of my instructions, but because of the
22 nature of the case and the possibility that you
23 might have some questions because the charge is
24 lengthy and there are multiple subparts here, I
25 decided I better write it out so if you ask me,

1 I can say the same thing twice instead of two
2 different things on each point. So please
3 excuse me to the extent that I am somewhat
4 reading, but I'm doing that for your benefit.
5 I think it will make life a lot easier.

6 We have come now to that part of the
7 trial where I am required to give you the final
8 charge of the Court. Please recall my earlier
9 instructions at the beginning of the trial and
10 any instructions given during the trial.
11 Again, please consider these instructions along
12 with the final charge that I am about to give
13 you as a connected series, remembering also
14 that all of them taken together constitute the
15 law which you must follow and apply in this
16 case. Remember again it is the responsibility
17 of the Court to decide all matters of law, and
18 therefore you must accept and must follow my
19 rulings and instructions on all matters of
20 law. You will recall, however, that I am not
21 the judge of the facts. It is not for me to
22 decide which of the facts are true. You the
23 jurors are the sole judges of the facts, and it
24 is your responsibility to weigh the evidence,
25 to find the facts, and to apply the rules of

1 law which I give you in order to reach your
2 verdict in this case.

3 You will also recall that a duty
4 accompanying that of judging the facts is the
5 requirement that you determine the credibility
6 of the witnesses who have testified in the
7 trial. You cannot determine which of the facts
8 are true in a trial based largely upon the oral
9 testimony of witnesses without deciding who you
10 will or will not believe or which testimony you
11 will or will not believe, or the weight that
12 you will attribute to the testimony of each
13 witness.

14 As judges of the facts, you decide the
15 believability of the witnesses' testimony.
16 That means that you decide the truthfulness and
17 accuracy of each witness' testimony and whether
18 to believe all, some, or none of that
19 testimony. Please recall that I gave you some
20 factors that the Court uses generally, but I
21 indicated to you that, with regard to assessing
22 the credibility of witnesses, you were free to
23 apply your own standards or you could use the
24 Court's standards or you could use some
25 combination of yours and the Court's, with the

1 understanding that whatever standard you
2 decided to use, that standard was applied to
3 each and every witness. So again, since I
4 can't know what your standards are, I'm going
5 to repeat what I said to you last week, what
6 the Court uses when it assesses credibility.

7 So the following are some of the
8 factors that you may and should consider when
9 determining the believability of the witnesses
10 and their testimony: How well could each
11 witness see, hear, or know the things about
12 which the witness testified? How well could
13 each witness remember and describe those
14 matters? Was the ability of the witness to
15 see, hear, know, remember, or describe those
16 things affected by age or any physical, mental,
17 or intellectual disability? Did the witness
18 testify in a convincing manner? How did the
19 witness look, act, and speak while testifying?
20 Was the witness' testimony uncertain, confused,
21 self-contradictory, or presented in an evasive
22 manner? Did the witness have an interest in
23 the outcome of the case or any bias or
24 prejudice or any other motive that might have
25 affected his or her testimony? Was a witness'

1 testimony contradicted or supported by other
2 witnesses' testimony on other evidence? Does
3 the testimony make sense?

4 We told you last week you don't park
5 your common sense at the courthouse door. Of
6 course, you are filtering everything through
7 that filter called common sense. Does it make
8 sense or does it not make sense? If you
9 believe some part of the testimony of a witness
10 to be inaccurate, consider whether that
11 inaccuracy casts doubt upon the rest the
12 witness' testimony, and when you are making
13 that assessment, you should consider whether
14 the inaccuracy is in an important matter or a
15 minor detail. You should also consider any
16 possible explanation for the inaccuracy. Did
17 the witness make an honest mistake or simply
18 forget or was there a deliberate attempt to
19 present false testimony?

20 If you decide that a witness
21 intentionally lied about a significant fact
22 that may affect the outcome of the case, you
23 may decide for that reason alone to disbelieve
24 the rest of the witness' testimony, but you are
25 not required to do so. As you decide the

1 believability of each witness' testimony, you
2 will at the same time decide the believability
3 of other witnesses and other evidence in the
4 case. If there is a conflict in the testimony,
5 you must decide which, if any, testimony you
6 believe. Again, you get the case piecemeal.
7 You get one witness at a time, but it is a
8 constant comparing and contrasting. What did
9 this witness say? What did that witness say?
10 Do they sync up? Do they not sync up or the
11 reasons for it, so it's a constant comparing
12 and contrasting. You're not looking at things
13 in a vacuum. You're looking at the big
14 picture.

15 Also, you may and should consider the
16 usual and logical test used by yourself to
17 determine truthfulness or the lack of
18 truthfulness. As the judges of believability
19 and facts in this case, you the jurors are
20 responsible to give the testimony of every
21 witness and all the other evidence whatever
22 weight you think it is entitled to receive.
23 You are, of course, required to consider and
24 apply all of the credible testimony in the
25 case. Testimony that you find not credible or

1 not believable, you put aside and you don't use
2 that in your analysis or in the application of
3 the law. So you apply the credible testimony
4 that you have commonly agreed to to the legal
5 principles.

6 There may be conflicts in the
7 testimony. You may find inconsistencies within
8 the testimony of a single witness or conflicts
9 between the testimony of several witnesses.
10 Conflicts or inconsistencies do not necessarily
11 mean that a witness intentionally lied.
12 Sometimes two or more persons witnessing the
13 same incident see, hear, or remember it
14 differently. Sometimes a witness remembers
15 incorrectly or forgets. If the testimony of a
16 witness seems inconsistent within itself or if
17 the testimony given by several witnesses
18 conflicts, you should try to reconcile the
19 differences. If you cannot reconcile the
20 differences, you must then decide which
21 testimony, if any, you believe.

22 Again, we have all been someplace, a
23 startling event occurs, and everybody starts
24 talking about it, and you have five different
25 versions of what's going on and you say how can

1 that be? And then you find one person was here
2 and one person was there, and that explains why
3 they have different versions of the event.
4 However, if you have two people standing there
5 when the event unfolds in front of them, they
6 are both capable of seeing and recording what
7 occurred and they disagree, then, of course,
8 you have got the conflict, and you have to
9 resolve the conflict.

10 Now, there is in the law what we call
11 prior inconsistent statements and prior
12 consistent statements. An inconsistent
13 statement, and to the extent that this exists,
14 and I'm only charging you with things that I
15 think you need to know, but with regard to an
16 inconsistent statement, you may have heard
17 evidence that a witness made a statement at an
18 earlier point in time that was inconsistent
19 with the testimony that they gave in court.
20 You may consider the earlier statement to
21 evaluate the believability, in other words, the
22 truthfulness and accuracy of the witness'
23 testimony in court. In other words, you could
24 say, now wait a minute. You said A on this
25 occasion. You say B on this occasion. One of

1 them is correct or maybe neither one of them
2 are correct, and you can decide which of those
3 statements you determine to be the truthful
4 statement and then apply that to the facts.

5 The other side of the coin is a prior
6 consistent statement, where a witness has said
7 A, A, A, A all along, and somebody comes along
8 and says, well, aren't you just saying A for
9 the very first time? And the witness says no,
10 the first time they talked to me I said A. The
11 second time they talked to me I said A. The
12 third time they talked to me, I said A, so a
13 consistent statement is one that the witness
14 has maintained all that long, and obviously
15 that is something that is used to bolster the
16 testimony of the witness that they have been
17 inconsistent. The inconsistent statement
18 undercuts them, so if you find that they're
19 saying A and B on different occasions, you can
20 use that to undercut the testimony of the
21 witness. You don't have to, but you can.

22 Now, again, we had the expert
23 witnesses testify in this case and we permitted
24 the expert witnesses to testify because they
25 had information that was outside the ordinary

1 realm of expected knowledge of jurors, so we
2 allow an expert to testify because they can
3 assist you in deciding certain issues in the
4 case. So please recall that the fact that I
5 permitted the witnesses to testify as experts
6 is not binding on you. You are making your own
7 independent determination, and the first thing
8 that you have to do is you ask yourself, "Does
9 the person have the requisite education,
10 training, and experience in the field in which
11 the person claims to be an expert?" If they
12 have that requisite education, training, and
13 experience, then you go on and you say, "Okay.
14 All of the relevant information that was out
15 there and available to them, what amount of
16 that information did they access and utilize in
17 coming to whatever opinion they're going to
18 hold?" To the extent that they offer an
19 opinion, they must offer that opinion to a
20 reasonable degree of certainty within their
21 field of expertise, either forensic accounting
22 or coaching matters, et cetera.

23 The fact that an expert opines an
24 opinion on the ultimate issue in the case, for
25 example, X dollars of money should be awarded

1 and the expert says this is X, that is not an
2 intrusion on your ability to make that decision
3 independently. That is simply another
4 statement of fact. The witness is saying, if
5 you find Facts A, B, and C, this is what the
6 number is, and if you happen to agree that
7 facts A, B, and C exists, and that the number
8 should be X, then you are, of course, free to
9 accept that, and the fact that he is saying
10 that in his opinion, even though the opinion is
11 ultimately yours, that's not an invasion of
12 your right as a juror. That is simply an aid
13 to help. So again, the expert testimony was
14 offered in areas where we did not anticipate
15 you would have the relevant expertise. You
16 make your own determination, and with regard to
17 the experts, you ask yourself what is the
18 supporting basis of it? Obviously, there are
19 disagreements between the experts. Each side
20 had experts, and to the extent that you find
21 there is a disagreement between the experts,
22 you ask yourself, "What is the basis of the
23 information that the expert makes their
24 decision upon?" You say to yourself, "Is this
25 correct information that they were making their

1 decisions based upon? Is it incorrect? Does
2 Expert A have more of a factual basis for his
3 opinion than Expert B? And you can consider
4 the relative education, training, and
5 experience of the experts. Does one expert
6 have more background than the other person? So
7 it is like anything else. It is an evaluative
8 process. You're looking at the person and
9 you're evaluating do they have the requisite
10 information to be rendering the opinion and do
11 they have a sufficient factual basis for it?

12 Now I want to discuss some principles
13 that apply. We may have talked about some of
14 them during the course of the trial. If not,
15 this will be the first time for some. We had
16 some stipulations of fact and stipulations of
17 testimony. Again, a stipulation of either fact
18 or testimony that has been offered and received
19 in evidence constitutes an agreement between
20 the parties that these facts may be accepted
21 and are not in dispute, so whatever the parties
22 stipulated to, they agree those facts are
23 accurate and there is no dispute about those
24 facts. You can use the facts as you see fit.

25 We had deposition testimony. We had

1 people read depositions into the record. We
2 saw some videotaped depositions. Again, an
3 accepted practice in civil litigation is to
4 take depositions for the convenience of the
5 parties, and they are conducted just as if the
6 person were here in court. Obviously, if we
7 don't have a videotaped deposition, you don't
8 get to look the person in the eye. You are
9 simply having the cold record to you, but they
10 are both accepted means of proceeding. Where
11 you saw the videotaped deposition, you had the
12 ability to look the person in the eye and make
13 some of those credibility determinations that
14 are part and parcel of assessing credibility.
15 How did the person look? How did they act?
16 What was their body language, because we all
17 know body language tells you a lot about what a
18 person is saying and their credibility,
19 believability, et cetera. With regard to
20 simply reading, you just have to listen to what
21 the person had to say, and again you are
22 assessing that testimony as you assess any
23 other testimony in the case. So the deposition
24 testimony is entitled to the same consideration
25 as if the witness testified here in open court.

1 To the extent that we had some
2 admissions, in other words, a question was
3 asked of somebody and said admit this, admit
4 that, if the party admits it, that is their
5 answer to that question, and you can use that
6 admission as you see fit, just as you can use
7 any other piece of evidence that you put
8 through the credibility test and say, okay,
9 this is a fact I'm going to rely upon. The
10 admission relieves you of that credibility
11 test. The other side is saying, yeah, I admit
12 that is a fact. The jury can do with that fact
13 whatever it is they want to do with that fact.

14 Now, in the law we have two different
15 types of evidence, and a fact can be proved in
16 either way or in both ways. We have what is
17 called direct evidence. A witness comes and
18 says, "I saw this. I heard this." That is
19 direct evidence. Everybody is familiar with
20 direct evidence and everybody is okay with
21 direct evidence.

22 In the law we also have what is known
23 as circumstantial evidence. Everyone is not
24 quite as familiar with circumstantial evidence,
25 and sometimes we look at it and say, "Well,

1 wait a minute. That's only circumstantial,"
2 but, in the eyes of the law, circumstantial
3 evidence is just as good as direct evidence, so
4 you can prove or disprove a fact in contention
5 either by direct evidence or circumstantial
6 evidence.

7 A party can prove their entire case by
8 circumstantial evidence. They don't have to
9 prove it by direct evidence. Again, direct or
10 circumstantial evidence works. Now, a simple
11 example will, I think explain the difference.
12 Let's assume there is a fire hydrant out in
13 front of the courthouse, and we have locked you
14 in here all day and all the windows were
15 closed. You can't see anything, and you walk
16 outside, and there is water all over the street
17 and there is water running down the street and
18 there is water glistening off all the cars that
19 are parked along the street, and some of the
20 cars going by have headlights and windshield
21 wipers going as they go by.

22 From all of those circumstances, you
23 would conclude that it had rained while you
24 were inside the building and the windows were
25 closed and you could not see outside the

1 window, because, of course, all of those
2 factors are consistent with it having rained
3 while you could not see it. On the other hand,
4 assume you have all of these factors ongoing,
5 and you look to your right and you see the fire
6 hydrant is broken and the water is spewing up
7 in the air. You, of course, would not conclude
8 that it had rained while you were inside. You
9 would conclude the fire hydrant broke and it's
10 spewing water up in the air, and that's why the
11 people are doing what they're doing and the
12 street is wet. So again, circumstantial
13 evidence is nothing more than proof of a series
14 of facts that cause you to logically conclude
15 another fact existed. So water running in the
16 street, the car is glistening, headlights on,
17 windshield wipers running, that would cause you
18 to conclude it rained while you were inside,
19 just as good as if you stepped outside and it's
20 pouring rain and you look and you know that it
21 is raining.

22 Now, just as we have two different
23 kinds of evidence, in this case, we have two
24 different burdens of proof, and, in the law, we
25 recognize three levels of proof. Generally, in

1 a civil case, the lowest standard of proof is
2 applicable, and that is called preponderance of
3 the evidence. That is the lowest standard that
4 a party has to meet. An immediate level is
5 what we call clear and convincing evidence, and
6 then the highest evidentiary standard is proof
7 beyond a reasonable doubt.

8 In a civil case, the only standards
9 that apply are preponderance of the evidence
10 and clear and convincing evidence. In a
11 criminal case, you have beyond a reasonable
12 doubt, because a possible consequence in a
13 criminal case is somebody may go to jail. So
14 you want the highest evidentiary standard to
15 apply when you are making the decision about
16 someone possibly going to jail. So proof
17 beyond a reasonable doubt is such a doubt that
18 would cause an ordinary, careful, sensible, and
19 prudent person to pause or hesitate before
20 acting in a matter of importance in your own
21 affairs. A reasonable doubt must fairly arise
22 out of the evidence presented or lack of
23 evidence presented. That is the criminal
24 standard. It does not apply in this case.

25 In this case, with regard to the

1 defamation claim, the standard is preponderance
2 of the evidence. So preponderance of the
3 evidence means we have got our scale. It is
4 dead even right now, when the case starts, and
5 what you do when you go into the jury room, you
6 put evidence that favors the plaintiff on one
7 side of the scale and you put evidence that
8 favors the defendant on the other side of the
9 scale, and when you put all of the evidence on
10 the scale for each side, all of the credible
11 evidence, if the scale tips ever so slightly,
12 that is preponderance of the evidence and the
13 plaintiff is entitled to prevail. If, when you
14 put all the evidence on the scale, the evidence
15 tips ever so slightly in favor of the
16 defendant, then, of course, the plaintiff can't
17 prevail, or, if at the end, they're dead-even,
18 the plaintiff can't prevail. For the plaintiff
19 to prevail on the defamation count, the scales
20 must be tipped ever so slightly in the
21 plaintiff's favor.

22 Now, with regard to the
23 misrepresentation claim, we have the
24 intermediate standard; that is, proof by what
25 the law refers to as clear and convincing

1 evidence. So criminal, beyond a reasonable
2 doubt. General rule, preponderance of the
3 evidence, the slightest tip of it, but
4 misrepresentation is in the middle with clear
5 and convincing evidence. The plaintiff must
6 prove his misrepresentation claim by a higher
7 burden of proof than applies to the defamation
8 claim. The plaintiff must prove his
9 misrepresentation claim by clear and convincing
10 evidence. Clear and convincing evidence means
11 the evidence is so clear, direct, and
12 substantially that you are convinced without
13 hesitation that a fact is true. Although this
14 is a significant burden of proof, it does not
15 mean that the plaintiff must prove the facts at
16 issue beyond all doubt or beyond a reasonable
17 doubt. Again, clear and convincing evidence
18 means the evidence is so clear, direct, and
19 substantial that you are convinced without
20 hesitation that the fact is true. Although
21 this is a significant burden of proof, it does
22 not mean the plaintiff must prove the facts at
23 issue beyond all doubt or beyond a reasonable
24 doubt.

25 Now, you will recall that a

1 stipulation was read during the trial with
2 regard to Mr. Curley and Mr. Schulz, and
3 essentially the stipulation read that, if
4 called as witnesses, they would decline to
5 answer certain questions on the grounds that
6 their answers might tend to incriminate them.
7 A person has a constitutional right to remain
8 silent and decline to answer on the grounds
9 that an answer may tend to incriminate him or
10 them. You may, but need not, conclude that the
11 answer would have been adverse to Penn State's
12 interests. So, in the civil law, there is a
13 provision that, if a person is within the
14 control of a party, that the expectation is
15 they would call the party and the party would
16 state whatever it is that the party is going to
17 state. Penn State contends in this case that
18 Mr. Curley and Mr. Schulz are really not within
19 their control, they don't work for them
20 anymore, and that they don't really have the
21 ability to call them. On the other hand, the
22 plaintiff asserts that, if, in fact, the
23 position is that Mr. McQueary did not tell them
24 what he claims that he told them and that
25 conversely he told them that he only saw

1 horseplay, they would have no Fifth Amendment
2 privilege because if they said we only told it
3 was horseplay, they can't get in trouble for
4 that, and the plaintiff wants you to draw the
5 adverse inference that the reason they are not
6 testifying is because, in fact, if they did
7 answer the question, it would be something
8 other than horseplay so that they assert that
9 they're entitled to that adverse inference.
10 You are not required to do that, so you have to
11 ask yourself which party has control over them,
12 and is the drawing of the adverse inference
13 permissible?

14 The plaintiff cannot meet his burden
15 of proof based solely on an adverse inference.
16 There has to be other evidence that the
17 plaintiff presented, and you will have to
18 recall what the evidence was that was presented
19 with regard to the misrepresentation count.

20 Now, obviously, Penn State University
21 is named as the defendant in the case. Penn
22 State can only act through its agents, its
23 employees, its officers, et cetera, so Penn
24 State admits that Graham Spanier, Cynthia
25 Baldwin, Gary Schultz, Tim Curley, Lisa Powers,

1 and Bill Mahon were at all times relevant
2 employees of the Pennsylvania State University
3 and also that Mr. Garban was the president of
4 the board of trustees, so these are people who
5 were either in the employ of or authorized to
6 act on behalf of the university. So if you
7 find that their actions were -- let me say it
8 this way, put it this way: An employer is
9 legally responsible for the wrongful acts of an
10 employee or agent committed during the course
11 of and within the scope of employment. In
12 certain circumstances, an employer's liability
13 may extend to intentional acts committed by the
14 employee. In determining whether the acts of
15 the employee were within the course and scope
16 of their employment, you should consider the
17 following factors: First, whether the act was
18 of a kind and nature the employee was employed
19 to perform. Second, whether the act occurred
20 substantially within the authorized time and
21 space limits of that person's employment. And
22 third, whether the act was set in motion, at
23 least in part by a purpose to serve the
24 employer, so was this conduct intended in some
25 manner to benefit the employer? This is what

1 we refer to as vicarious liability, so that the
2 university would be responsible for the acts of
3 those agents individually, collectively,
4 whatever, that you find met that standard.

5 Everybody with me so far? Okay.

6 In giving my instructions on the law,
7 I may invite your attention to various facts
8 which you may consider in your evaluation of
9 some of the evidence in the case. In doing so,
10 I will not attempt to indicate or express any
11 opinion whatsoever on my part concerning the
12 credibility or weight of the evidence or any
13 part of it, and I don't want you to think
14 otherwise. Sometimes you just have to refer to
15 some of the facts to explain the point. I say
16 the first fact that pops into my mind to help
17 me explain the point. I have no view of the
18 facts whatsoever. You are the factfinders. To
19 the extent that I reference any facts, I will
20 try to balance them for each side so that one
21 side isn't saying, well, you said three things
22 for them and only two things for us, so I will
23 do my best to balance it, and actually I will
24 do my best to stay away from referring to
25 anything, but to the extent that I do refer to

1 something, do not go back into the jury room
2 and say, well, the judge talked about that;
3 that must really be important. Not true. I
4 have no view of the facts, and I don't want you
5 to view any comment I make in that manner.

6 Again, in making your assessment of
7 the evidence, I said to you last week and I say
8 again that your role is essentially that of
9 clinicians. Information is streaming by, and
10 you are collecting out the information that you
11 believe to be credible and believable, and you
12 are doing that in an analytical fashion.
13 You're not doing it with any sympathy or bias.
14 There is no room for that in the decision. It
15 is simply an analysis. What are the credible
16 and believable facts? Who are the credible and
17 believable witnesses? Once you have got that,
18 you plug it into the law, and the verdict is
19 whatever the verdict is.

20 Now, the first cause of action that
21 the plaintiff asserts is a cause of action for
22 defamation. Again, the burden of proof for
23 defamation is preponderance of the evidence,
24 the slightest tipping of the scale in the
25 plaintiff's favor. So when you are done and

1 you put all the evidence on the scales, one
2 side or the other, if the scales tip ever so
3 slightly in Mr. McQueary's favor, he prevails.
4 If they don't, in favor of the defendant, he
5 doesn't prevail. If they are dead-even, he
6 doesn't prevail. At the end of the day, they
7 have to be tipped ever so slightly in his
8 favor.

9 A person -- and, again, I'm using the
10 term person, but I mean the university, because
11 the university is vicariously liable for the
12 actions of its employee agents. A person
13 otherwise liable for publishing a communication
14 that is defamatory of another is responsible
15 for all harm suffered by the person defamed as
16 a result of that publication. The burden is on
17 the plaintiff to prove the elements of the
18 defamation claim, which I will now instruct you
19 on, again by a preponderance of the evidence.
20 A communication is any act by which a person
21 brings an idea to another's attention. A
22 communication may be made by speaking or by
23 writing words or by another act or combination
24 of acts that result in bringing an idea to
25 another person's attention.

1 A communication or any portion of it
2 is defamatory if it tends to so harm the
3 reputation of that person as to lower him in
4 the estimation of the community or to deter
5 third persons from associating or dealing with
6 him. A communication that implies a person has
7 committed a crime is defamatory per se,
8 automatically defamatory. Words are not
9 defamatory merely because they are annoying or
10 embarrassing to the person referred to in the
11 communication. In deciding whether the
12 communication was defamatory, you should
13 consider the message the communication would
14 send to the average person who could have been
15 expected to receive it. This means you should
16 consider the innuendos and implications of what
17 was said as well as inferences the receivers
18 would have drawn from what may not have been
19 said. You should also consider the context in
20 which the alleged defamatory statement was
21 made.

22 It is not necessary that the
23 defamatory statement be the primary focus of
24 the communication in order for the plaintiff to
25 succeed. A plaintiff may recover on the basis

1 of even a small portion of the communication if
2 it is defamatory. It is not a defense that
3 that portion is not the primary focus of the
4 communication, so you are just looking at it
5 and saying is there a defamatory statement in
6 there? It does not have to be the whole
7 statement.

8 A defendant is responsible for
9 communicating a defamatory statement if the
10 person personally communicated or directed or
11 participated in another's publication of the
12 defamatory statement. The burden is on the
13 plaintiff to show that the defendant either
14 personally published the communication or
15 directed or participated in another's
16 publication of the statement. It is not
17 necessary for the plaintiff to be specially or
18 specifically identified by name or official
19 position for the communication to defame him.
20 The plaintiff may be defamed if a description
21 or reference tends to identify him. The
22 plaintiff also may be defamed where a recipient
23 of the communication is familiar with the
24 circumstances mentioned in the communication
25 and recognizes that it concerns the plaintiff.

1 The burden is on the plaintiff to show that the
2 description or reference in the communication
3 or familiarity with the circumstances would
4 lead the recipients of the communications to
5 reasonably understand that it was referring to
6 the plaintiff.

7 A communication may be false either
8 because it contains untrue or incomplete
9 statements of fact or because it's implication
10 is untrue. It is presumed that a defamatory
11 statement that does not involve a matter of
12 public concern or was published by a person or
13 entity who was not a member of the media is
14 false. The burden is on the defendant to
15 overcome this presumption. That means the
16 burden is on the defendant to prove by a fair
17 preponderance of the evidence that the
18 communication was true.

19 The university asserts that the
20 alleged defamatory communication is purely an
21 expression of opinion. The plaintiff denies
22 that this is so. A defendant is not liable for
23 the communication that is a pure opinion and
24 does not state or imply any facts. A fact is
25 something that can be proven true or false. An

1 opinion, on the other hand, cannot be proved
2 true or false. A communication is not
3 protected merely because it is said to be an
4 opinion. A communication is not protected if
5 it states a defamatory fact or implies that
6 undisclosed defamatory facts exist concerning
7 the plaintiff. The plaintiff must prove that
8 the communication stated the defamatory fact or
9 implied the existence of undisclosed defamatory
10 facts concerning the plaintiff.

11 Now, as I said to you previously, if I
12 came to where you worked and you were
13 explaining your job to me, I might have to have
14 you explain it more than one time, and I
15 recognize that I have just given you a
16 mouthful. So, if you get back there and you
17 have any hesitancy about what I said, do not
18 hesitate to ask me to re-explain these
19 principles of law to you, because we don't want
20 there to be any confusion, and the simple way
21 you do that is whoever is the foreperson just
22 writes a note and says, "Could you please re-
23 explain A, B, C," whatever it is you want, and
24 I am happy to do that.

25 Now I'm going to talk about the

1 damages that relate to the defamation count,
2 and the fact that I am instructing you as to
3 damages does not mean that I'm suggesting you
4 are going to get there or that you should get
5 there or anything else. It is like everything
6 else. I'm just giving you all of the
7 applicable law that you need to decide the
8 case.

9 If you find that the defendant is
10 liable to the plaintiff, you must then find an
11 amount of money damages you believe will fairly
12 and adequately compensate him for both the
13 physical and financial injury he has sustained
14 as a result of the occurrence. The amount you
15 award today must compensate the plaintiff
16 completely for damages sustained in the past as
17 well as damages the plaintiff will sustain in
18 the future. So you're looking from the date of
19 the alleged defamatory article through today's
20 date -- again, if you get there. I'm not
21 suggesting that -- and then, if you get there,
22 from today's date forward.

23 When you consider the question of
24 compensatory damages, and these damages are
25 considered compensatory, you don't consider the

1 wealth of Penn State University. If you get to
2 the issue of punitive damages, you do consider
3 the wealth of the university. So, with regard
4 to compensatory damages, you are simply saying
5 what amount of money will fairly and adequately
6 compensate him for all of the physical and
7 financial injury he has sustained? Again, it
8 is his burden to prove by the preponderance of
9 the evidence what injury and harm he has
10 sustained, and again, the idea is fair
11 compensation to the extent that you find he
12 suffered harm and is entitled to compensation.

13 With regard to the amount of
14 compensation, there needs to be what the law
15 refers to as a nexus. There has to be some
16 connection between the harm and what is the
17 reasonable level of compensation. It should
18 not be speculative on your part, so you have to
19 listen to the evidence that was presented and
20 you have heard the testimony of the experts, et
21 cetera, to put some causal connection and nexus
22 there for you to consider.

23 The law also recognizes with regard to
24 compensable damages that a plaintiff has a duty
25 to mitigate or to lessen his damages, and the

1 university asserts that it is Mr. McQueary's
2 duty to have mitigated his damages, to lessen
3 the damages that he is asserting. In other
4 words, you have to find that there was
5 substantially comparable work available to the
6 plaintiff and that he failed to exercise
7 reasonable diligence in seeking out that work.
8 If you find that there was comparable work
9 available and that he was not diligent in
10 seeking out that work, then you could find that
11 he failed to mitigate his damages, and you
12 could reduce your compensatory claim by that
13 amount. However, the university must provide
14 or prove that there was substantially
15 comparable employment available to him and that
16 he did not take reasonable steps to obtain that
17 employment, so the burden of proof is on them
18 to establish that he failed to mitigate the
19 damages that he is seeking.

20 Now, the specific damages in
21 defamation, the plaintiff is entitled to be
22 fairly and adequately compensated for all the
23 harm he suffered as a result of the false and
24 defamatory communication published by the
25 defendant. The injuries for which you may

1 compensate him by an award of compensatory
2 damages include, first, the actual harm to his
3 reputation that you find resulted from the
4 defendant's conduct; secondly, the emotional
5 distress, mental anguish, and humiliation that
6 you find he suffered as a result of the
7 defendant's conduct; and third, any other
8 special injuries that you find he suffered as a
9 result of the defendant's act, so harm to
10 reputation, emotional distress, mental anguish,
11 humiliation, and any other special injuries
12 that you find he suffered. Those are items of
13 compensable damages.

14 If you find that the defendant acted
15 either intentionally or recklessly in
16 publishing the false and defamatory
17 communication, you may presume that the
18 plaintiff suffered both injury to his
19 reputation and emotional distress, mental
20 anguish, and humiliation that would follow from
21 such a communication. This means that Mr.
22 McQueary would not have to prove any of that.
23 So if you find that the university acted
24 intentionally or recklessly with regard to the
25 defamatory publication, Mr. McQueary is

1 relieved from having to prove the humiliation,
2 the embarrassment, those items. So again, if
3 you find that the publication was intentionally
4 or recklessly made, this means that the
5 plaintiff does not have to provide proof that
6 he suffered emotional distress, mental anguish,
7 and humiliation, as such harm is presumed by
8 the law when a defendant publishes a false and
9 defamatory communication with the knowledge
10 that it is false or with reckless disregard of
11 whether it is true or false.

12 In determining the amount of an award
13 for such presumed injury to the plaintiff's
14 reputation and suffering of emotional distress,
15 mental anguish, and humiliation by the
16 plaintiff, you may consider the character and
17 previous general standard and reputation of the
18 plaintiff in the community. You may also
19 consider the character of the defamatory
20 communication that the defendant published, its
21 area of dissemination, how wide was it, and the
22 extent and the duration of the publication.
23 You may also consider what the probable effect
24 of the defendant's conduct had on the
25 plaintiff's profession and the harm that he may

1 have sustained in that profession as a result
2 of the conduct of the university.

3 The motive and purpose of the
4 defendant and its belief or knowledge of the
5 falsity of the publication and the conduct of
6 the plaintiff are not to be considered by you
7 in determining the amount of damages to which
8 the plaintiff is entitled for the above-stated
9 items. Okay. So whether they did it falsely
10 or with ill-motive does not apply to the
11 compensatory damages. It only applies to the
12 extent that it might relieve Mr. McQueary of
13 having to prove the elements of embarrassment,
14 et cetera, but it does apply when you talk
15 about punitive damages. So the defendant
16 asserts he's entitled not only to compensatory
17 damages by the conduct of the university, but
18 he is entitled to punitive damages. So, with
19 regard to punitive damages -- I got myself out
20 of order there.

21 Okay. Punitive damages with regard to
22 the defamation claim -- you may also award
23 punitive damages against the Pennsylvania State
24 University if you find that the actions of Mr.
25 Curley or Mr. Schulz or Dr. Spanier were, first

1 of all, outrageous; second, occurred during and
2 within the scope of their duties, so the duties
3 Mr. Curley performed and Mr. Schulz performed
4 or Dr. Spanier performed, and third, that they
5 were not committed to satisfy either Mr. Curley
6 and Mr. Schulz or Mr. Spanier's personal ill
7 will or malice, but instead were committed with
8 the intent to further the university's
9 interest. So you ask yourself, were they
10 acting for their own interest or were they
11 acting for the university's interests? And
12 again, you have to find that it was outrageous
13 and within the scope of their duties.

14 If you find that the conduct of the
15 defendant through any one of those named
16 individuals was outrageous, you may award
17 punitive damages in addition to the
18 compensatory damages that you award in order to
19 punish the defendant for its conduct and to
20 deter the defendant and others from committing
21 similar acts. A person's conduct is outrageous
22 when it is malicious, wanton, willful, or
23 oppressive, or shows reckless indifference to
24 the interest of others. Conduct is outrageous
25 when it is malicious, wanton, willful, or

1 oppressive. Therefore, you may only find that
2 the university's conduct was outrageous if you
3 determine that the university acted
4 maliciously, wantonly, willfully, or
5 oppressively.

6 Reckless indifference is defined in
7 this manner: Reckless indifference to the
8 rights of others, sometimes referred to as
9 wanton misconduct, has been defined to mean
10 that the actor has intentionally done an act of
11 an unreasonable character in disregard of a
12 risk known to him or so obvious that he must be
13 taken to have been aware of it and so great as
14 to make it highly probable that harm would
15 follow. You may only find that the
16 university's conduct was recklessly indifferent
17 to the rights of plaintiff if you determine
18 that the university intentionally disregarded a
19 known or obvious risk with an awareness that
20 doing so made it highly probable that harm
21 would follow.

22 If you find in favor of Mr. McQueary
23 on either the defamation and/or the fraudulent
24 misrepresentation count, that, in and of
25 itself, is not sufficient to award punitive

1 damages. He would get his compensatory
2 damages. To award punitive damages, you have
3 to go the extra step and say was the conduct of
4 the university outrageous? So what separates
5 compensatory damages from punitive is the
6 conduct is outrageous; that, in fact, you are
7 going to punish someone for engaging in such
8 conduct which they knew would occur or could
9 reasonably anticipate was going to occur and
10 were trying to deter that in the future.

11 In assessing the amount of punitive
12 damages, if you decide to award punitive
13 damages in either the defamation claim or the
14 misrepresentation claim, these are the factors
15 you should consider: You should consider the
16 character of the university's conduct. In
17 other words, what did they do? Second, the
18 nature and the extent of the harm to the
19 plaintiff that the university caused or
20 intended to cause. Third, the wealth of the
21 university insofar as it is relevant in fixing
22 an amount that will punish it and deter it in
23 others from like conduct in the future, and you
24 heard one of the individuals come in and
25 testify as to what the net worth of the

1 university was at the relevant time frames, and
2 you will have to recall that. So you would be
3 looking at saying, "Okay. The entity has this
4 amount of money." Also, it is not necessary
5 that you award compensatory damages to the
6 plaintiff in order to assess punitive damages
7 against the university. As long as you find in
8 favor of the plaintiff and against the
9 university on either the defamation or the
10 misrepresentation claim, you can find in his
11 favor and decide, well, we're not going to give
12 him any compensatory damages, but we are going
13 to award punitive damages, so then you make the
14 additional analysis. Was the conduct
15 outrageous? What was the intent? What was the
16 expectation?

17 Again, with regard to punitive
18 damages, it is just like compensatory damages.
19 There has to be some nexus. There has got to
20 be some hook you are going to hang your hat on.
21 So you say to yourself the amount of punitive
22 damage awarded must not be the result of
23 passion or prejudice against the university on
24 your part. The sole purpose of the punitive
25 damages is to punish the university's

1 outrageous conduct and to deter it and others
2 from similar conduct. So compensatory damages,
3 you're compensating Mr. McQueary for the harm
4 that he has suffered up to today's date and the
5 harm that you anticipate he would suffer in the
6 future. With regard to punitive damages,
7 you're saying what amount of money is it going
8 to take to say to these individuals, the
9 university or other similar situated, don't do
10 this again, and that is the difference, and
11 those factors as to punitive damages apply in
12 both the damage assessment under the defamation
13 claim and the claim for misrepresentation.

14 Everybody still with me? You are all
15 smiling. I don't know.

16 Now, intentional misrepresentation,
17 again, here the standard is clear and
18 convincing evidence. Again, clear and
19 convincing evidence means the evidence is so
20 clear, direct, and substantial that you are
21 convinced without hesitation that a fact is
22 true. Although this is a significant burden,
23 higher than the preponderance, it does not mean
24 the plaintiff must prove the facts at issue
25 beyond all doubt or beyond a reasonable doubt.

1 So the plaintiff has to prove the following
2 facts: First of all, that a representation was
3 made to Mr. McQueary by either Mr. Curley or
4 Mr. Schulz or whomever you find that he was in
5 communication with; that the representation was
6 material to the matter at hand, and the matter
7 at hand would be the information that Mr.
8 McQueary said he was reporting; that the
9 representation was made falsely, with knowledge
10 of its falsity, or recklessness as to whether
11 it was true or false. So the response that
12 they gave him, was it false or was it
13 recklessly made? It was made with the intent
14 of misleading Mr. McQueary into relying on the
15 statement and that Mr. McQueary was justifiably
16 relying on the statement. Finally, that the
17 injury Mr. McQueary has suffered was
18 proximately caused by his reliance on the
19 information that was conveyed to him.

20 Now, if you find as a fact, and I'm
21 not suggesting it, but if you find as a fact
22 that Mr. McQueary reported to Mr. Curley that
23 the conduct he observed between Mr. Sandusky
24 and the boy in the shower that night was of a
25 sexual nature, I tell you as a matter of law

1 that Mr. Curley was a mandated reporter and was
2 required to report that to the police and
3 either the Department of Public Welfare or
4 Children and Youth Services, whatever was the
5 appropriate agency at that point in time, and
6 that when -- and again, if you find, and I'm
7 not suggesting you find it -- but if you find
8 that Mr. McQueary was told by Mr. Curley and/or
9 Mr. Schulz that appropriate action would be
10 taken, and at the time they made that
11 statement, that was a false statement and that
12 Mr. McQueary relied upon that and that Mr.
13 McQueary has subsequently suffered harm, then
14 Mr. McQueary would be entitled to prevail on
15 the misrepresentation claim. If you find that
16 Mr. Curley told Mr. Schulz and/or told Dr.
17 Spanier what it is that Mr. McQueary says he
18 told Mr. Curley -- in other words, it was
19 conduct of a sexual nature -- Mr. Schulz and
20 Dr. Spanier were also mandated reporters, and
21 they were required to report it to the police
22 and/or the appropriate agency, DPW or Children
23 and Youth Services.

24 Conversely, if you find as a fact that
25 what Mr. McQueary told Mr. Curley was that he

1 saw horseplay, then, of course, we are in a
2 gray area as to whether or not that was
3 evidence of sexual misconduct that would
4 require mandatory reporting. So you have to
5 make a determination as to what, in fact, Mr.
6 Curley was told by Mr. McQueary. If it was of
7 a sexual nature, mandatory. If it was not of a
8 sexual nature, if the message was, "I just saw
9 horseplay," then we don't have the mandatory
10 issue, and again you will have a different type
11 of analysis. So, to sum it up, when they tell
12 him -- this is the plaintiff's position -- that
13 we will take appropriate action, under the
14 scenario as Mr. McQueary presents it,
15 appropriate action means the police and
16 Children and Youth Services. If you accept the
17 statement that it was horseplay, we will look
18 into it and will take action, not necessarily
19 going to the police, the statement was material
20 to the transaction. In other words, what they
21 told Mr. McQueary, if you find it the way Mr.
22 McQueary said it was, then they're telling him,
23 "We're going to do the appropriate thing,"
24 which means we're going to the police, et
25 cetera; that it was made falsely or with

1 knowledge of its falsity or recklessness as to
2 whether it was true or false. So you're going
3 to have to decide, when they gave him that
4 information, which one of them gave it to him
5 and whether or not the intent really was that
6 they were going to take appropriate action.
7 Again, under Mr. McQueary's scenario, it means
8 reporting. If you accept the scenario that it
9 is horseplay, it's a different matter; that
10 they made the statement with the intent of
11 misleading Mr. McQueary into relying upon it.
12 I tell you as a matter of law that Mr. McQueary
13 was not a mandated reporter. He was not
14 required to go to the police. Mr. Curley, Mr.
15 Schulz, Dr. Spanier, because of their positions
16 in an institution of higher learning, they were
17 mandated reporters. So you have to ask
18 yourself what was the chain of command for Mr.
19 McQueary? Did he follow it, et cetera?
20 Justifiable reliance on the misrepresentation -
21 - was Mr. McQueary justified in relying on the
22 statement that we will take appropriate action,
23 we'll follow it up, et cetera, the charges are
24 serious, whatever way you find the facts, and
25 then finally, that the result injury was

1 proximately caused by Mr. McQueary's reliance
2 on the misrepresentation.

3 Everybody with me there? Okay.

4 A misrepresentation is any assertion,
5 by words or conduct, that is not in accordance
6 with the facts. A misrepresentation is an
7 assertion by words or conduct that is likely to
8 mislead another regarding the facts. A fact is
9 material if it is one that would be of
10 importance to a reasonable person in deciding
11 on a course of action. A material fact,
12 however, need not be the sole or even a
13 substantial factor in inducing or influencing a
14 reasonable person's decision. A fact is also
15 material if the person who fails to disclose it
16 knows that the person to whom it is made is
17 likely to regard it as important even though a
18 reasonable person would not regard it as
19 important. Reliance means a person would not
20 have acted as he did or would not have failed
21 to act as he did unless he considered the
22 misrepresentation or misleading representation
23 to be true.

24 Again, with regard to the damages, the
25 damages analysis essentially is the same. The

1 first question is, if you find liability under
2 misrepresentation, and I'm not suggesting that
3 you find it, but if you do, you go back and you
4 say what are the appropriate compensatory
5 damages? And again, what you ask yourself is
6 what was the actual harm to Mr. McQueary's
7 reputation that resulted from the defendant's
8 conduct, the emotional distress, the mental
9 anguish and humiliation you find he suffered as
10 a result of the defendant's conduct and any
11 special injuries that you find he suffered. So
12 it is the same analysis under both the
13 defamation claim and the misrepresentation
14 claim as to compensatory damages. The slight
15 twist is that there may be a circumstance under
16 the defamation claim where he didn't have to
17 prove it; it was assumed that he had all of
18 these injuries. But here, he has to prove the
19 damages. In other words, he has to have
20 presented evidence that would convince you that
21 he suffered the type harm that he is asking
22 for, and again, with punitive damages, the
23 analysis is strictly the same, whether the
24 conduct was outrageous, whether the type harm
25 he suffered was intended or reasonably

1 anticipated, and that the intent of a punitive
2 damage award is to punish or deter conduct, and
3 again, you would be looking at the network of
4 the university. Again, there needs to be some
5 nexus, some connection, so in every damage
6 analysis, there needs to be a nexus or a
7 connection between the amount of compensatory
8 damages and/or punitive damages that you arrive
9 at. It's not just a number plucked out of thin
10 air. You have to look at the evidence that was
11 presented and say, based on this credible
12 evidence, what level of harm do we assess is
13 the appropriate level of harm and/or damaged
14 based on that. Again, I'm not suggesting that
15 you get there. The university's position is we
16 didn't defame him, we didn't misrepresent him,
17 and we have no liability to him. Again, that
18 is your call, because you have to decide the
19 facts and then apply the law.

20 Counsel, do you want to come up here a
21 moment?

22 (Whereupon, the following discussion
23 was held at sidebar:)

24 THE COURT: Anything?

25 MR. STROKOFF: Your Honor, early on,

1 when you were giving the general instruction
2 with respect to compensatory damages, you said
3 that will fairly compensate the party for
4 injuries physically -- I'm sorry -- for
5 physical injuries caused by the defendant.
6 Now, later you said for emotional, you know, so
7 it might be corrected, but twice on
8 compensatory damages you said physical injury.

9 THE COURT: Okay. I read Ms. Conrad's
10 standard point. A party can recover only those
11 damages that will fairly compensate that party
12 for the injuries sustained by the defendant.

13 MR. STROKOFF: But what I heard, Your
14 Honor, was physical injuries.

15 THE COURT: Okay. Physical injury --
16 okay. Anything else?

17 MS. CONRAD: With respect to the
18 defamation claim, I heard reference to Curley
19 and Schulz. Based on my understanding of what
20 is in the complaint, the defamation claim was
21 directed solely to Dr. Spanier.

22 MR. STROKOFF: Well, in that regard,
23 we did maintain that it was Spanier as well as
24 the others who published it, but the Curley and
25 Schulz should not be part of --

1 THE COURT: I'll take that out.

2 MS. CONRAD: Thank you. And, of
3 course, my continuing objection with reference
4 to the mandated reporter.

5 THE COURT: You guys have got it 12
6 ways from Sunday on that.

7 MS. CONRAD: Thank you, sir.

8 THE COURT: Okay.

9 (End of sidebar discussion)

10 THE COURT: Members of the jury, when
11 I was talking about the defamation claim, to
12 the extent that I may have put Mr. Curley and
13 Mr. Schulz's name in there, that was an error
14 on my part, because, of course, you will recall
15 that it was Dr. Spanier and you will recall the
16 other persons who were present for the
17 discussion about the article, and Mr. Curley
18 and Mr. Schulz were not there. So, to the
19 extent that I said that, I was in error, so we
20 are not looking at the conduct of Curley and
21 Schulz with regard to the defamation claim. We
22 are looking at the university's acts through
23 Spanier and the other people who were present
24 on that. Clearly, with regard to the
25 misrepresentation claim, it is Mr. Curley, Mr.

1 Schulz, Dr. Spanier, so I want to correct that.
2 And then again, with regard to the damages
3 claim, it's not only that you're compensating
4 him for any injuries that he suffered, physical
5 injuries, but emotional injuries also. So,
6 again, if I didn't make that clear, I want to
7 make that clear. That is an item for
8 compensable damage.

9 Now --

10 MS. CONRAD: Your Honor, may we
11 approach?

12 THE COURT: Yes.

13 (Whereupon, the following discussion
14 was held at sidebar:)

15 MS. CONRAD: Again, while I don't mean
16 to cover it, my understanding of the defamation
17 claim is only to Spanier. You included the
18 other people in your instruction.

19 THE COURT: I have them there because
20 they were the agents of the university. You
21 want it limited specifically to Spanier --

22 MR. STROKOFF: Right, but--

23 THE COURT: -- I think they
24 participated, so there was already agreement
25 that it be published, and two of them actually

1 wrote part of it.

2 MS. CONRAD: I'm just going back on my
3 recollection of what is in the complaint, sir.

4 THE COURT: Okay. Fine. You have got
5 yourself a record.

6 MS. CONRAD: Thank you.

7 (End of sidebar discussion)

8 THE COURT: All right. I guess this
9 fits in with the general housekeeping details.
10 Again, I remind you, you must follow my
11 instructions on the law. I also remind you I
12 am not the judge of the facts. It is your duty
13 to consider the evidence and decide which are
14 the true and correct facts. Once you do that,
15 you are going to apply the rules that I've
16 given you to determine whether or not the
17 plaintiff has proven his claims by the
18 appropriate burden of proof, preponderance of
19 the evidence or clear and convincing evidence.

20 The first order of business when you
21 go in there is you need to select a foreperson
22 of the jury. That person has no authority over
23 anybody else on the jury, but that is the
24 person that I'm going to interact with as we go
25 forward. So select a foreperson. If there is

1 any need for the jury to communicate with the
2 Court, what I ask you to do is write your
3 question out, the foreperson signs it, knock on
4 the door, hand the note to the tipstaff and
5 they will bring it to me, and I will respond as
6 promptly as I can to your question.

7 Secondly, the foreperson should be the
8 one who leads the discussion, has no more
9 authority over anybody else, but we need to
10 have someone in charge of saying, "Let's go
11 around the table," because, when you walk in
12 there, now you're going to be free to talk, and
13 everybody's going to want to talk, and if you
14 are like me, when someone starts talking, I'm
15 already talking at them, so we need to get some
16 semblance of order in there, and the foreperson
17 should said, "Okay. Let's go around the room
18 and, you know, what is your position on this
19 person, on that person, et cetera?" because
20 again each of you is going to have your own
21 view of what the testimony of the witnesses is,
22 who is believable, who is not believable, et
23 cetera, and now you are no longer an
24 independent contractor. Now you are part of
25 the team, and you've got to get together and

1 have the team approach. What is the team
2 decision on Point A, B, C, and D, et cetera?
3 You can agree or disagree with the team
4 position, but at some point in time we need a
5 team decision.

6 Part of the process of going around
7 the room is -- I have noted that some of you
8 are diligent note takers, some of you not quite
9 so diligent note takers. Again, the folks who
10 took the notes, now you get to put your notes
11 up on the table and you get to say, "Well, when
12 I heard Witness X, this is what I wrote down."
13 Maybe a not so diligent note taker or a non-
14 note taker said, "Well, wait a minute. I don't
15 agree that the witness said that. I think they
16 said this." The note taker does not get any
17 plus mark next to their view of what the
18 witness had to say. Each juror's view counts.
19 The fact that somebody wrote it down does not
20 necessarily mean they wrote it down correctly.
21 So again, the notes are an aid. You can put
22 them up there. You can discuss them and use
23 them as part of the deliberative process. In
24 the end, you're going to turn them in, and on a
25 nice chilly night like tonight, they will be

1 destroyed and that will be the end of them, so
2 no one will ever know what you wrote down as a
3 note.

4 I'm not sure that you will recall the
5 oath that you took last Monday, but you all
6 raised your hand and you said that you would
7 well and truly try this case in accordance with
8 the facts and the law, and I think many times
9 jurors don't bother to consider the oath that
10 they take. It is sort of like when you join
11 the military and you put your hand up and you
12 say I'm going to do this, it is dead serious,
13 and your oath is dead serious, but even before
14 you took that oath, you looked us all in the
15 eye when we talked to you during the individual
16 voir dire and we said to you this is a
17 prominent case. We're going to be in the
18 press, and everybody knows it, and virtually
19 everybody in Centre County has some tie to Penn
20 State University one way or another. Some of
21 you work for them, have family that work for
22 them, or otherwise, but you looked us in the
23 eye and you said, "Judge, parties, we can be
24 fair and impartial. We can put that aside, and
25 we can be those analysts that you want. The 12

1 of us are going to review that evidence,
2 determine what is credible and believable, plug
3 it into the law, and whatever is the verdict is
4 the verdict." It is sort of like the oath in
5 the military, and I'm proud to have served in
6 the Marine Corps, and one of the ads they run
7 is which way would you run when there's
8 conflict? Are you running towards it or away
9 from it? So I'm confident that you folks are
10 going to do exactly what you said you would do.
11 You are going to go in there, you are going to
12 sit down, and you're going to have a mature
13 discussion. Everybody has a viewpoint. Each
14 person is going to express his or her
15 viewpoint. If, after discussion, you decide
16 your viewpoint is incorrect and you should
17 change it, I trust you will be mature enough to
18 do that. On the other hand, if, after you
19 listen openly to what everybody else has to
20 say, and you say, "No, I'm convinced my
21 position is right," by all means, stick to your
22 position, because, as we mentioned last week,
23 you are going to go home tonight or whenever
24 the verdict is over and you're going to be
25 facing yourself in the mirror, and you have to

1 be able to say, "I voted my conscience. I
2 didn't vote the way somebody wanted me to vote.
3 I voted my conscience in accordance with the
4 facts and the law, and I voted my conscience in
5 accordance with the oath that I took and that
6 the attorneys and the parties were relying
7 upon." So, in a civil case, there is room for
8 disagreement. We don't require a unanimous
9 verdict. We only require 10 jurors to agree to
10 the verdict. So what you do is you are going
11 to have a verdict slip, and there is going to
12 be a series of questions on the verdict slip,
13 and you simply go down to question number one
14 and you answer question number one, and when 10
15 of you have agreed on the answer to number one,
16 that is the answer. You go onto the next item,
17 and when 10 of you agree on that item, that's
18 the answer, and you just go through that entire
19 process until you run out of questions that you
20 have to answer, and as long as 10 people can
21 answer each of the questions -- it does not
22 have to be the same 10. You can have a
23 different 10 for the questions, et cetera. You
24 just need 10 each time. So once the
25 questionnaire is filled out, if you are capable

1 of answering all the questions, you do so. If,
2 for some reason you are not, then you can
3 simply have the foreperson send out a note and
4 say, "For whatever reason," and I don't want to
5 know the reason, simply say, "We are not able
6 to reach a verdict," and I'm not suggesting
7 that that's going to happen or anything, but
8 I'm just saying, if it does, there is a method
9 that I can utilize. At no point in time do I
10 ever want to know where you stand with regard
11 to a verdict, so don't send me out any
12 questions that suggest anything one way or
13 another. When you pass notes to the clerk,
14 you're not saying anything to them. If you get
15 to the point when there is a verdict and you've
16 answered the questions, then simply tell the
17 clerk that you have verdict and everybody will
18 reassemble and the verdict will be taken in
19 open court.

20 I'm assuming that everyone has
21 surrendered their cell phones and everything
22 else, and there's not going to be any
23 independent inquiry in there. I have to say
24 that because I'm required to. I don't believe
25 for a moment there is going to be any. I have

1 watched you all week. I have a luxury the
2 lawyers don't have. I can watch you as they
3 are doing other things, and I'm impressed by
4 the diligence and the attention that you have
5 paid, so I know you are going to go back in
6 there and you're going to assess that evidence
7 and come up with a verdict that you believe to
8 be appropriate.

9 Now, Ms. Breger and Ms. Blake, do
10 either one of you have anything in the jury
11 room that you would like to retrieve? Would
12 you please step out and retrieve it and then
13 come back?

14 While we're waiting for the two
15 ladies, members of the jury, when you go out,
16 if you would like a beverage order and some
17 snacks and things of that nature, let us know
18 and we will take care of it. With regard to
19 exhibits, I don't intend to send anything out
20 to you right now, because I have no idea where
21 to begin with that inquiry. If you would like
22 to see some exhibits, again, I ask that the
23 foreperson identify what it is that you want to
24 see. Please recall my comments when we were
25 dealing with the exhibits. I said some get

1 admitted for record purposes. Some you might
2 get to see. So, if you ask for something, I
3 will indicate whether or not it is the type of
4 exhibit that you would be entitled to receive.
5 So, to the extent you ask, I will give you what
6 you again have and, of course, what you can't,
7 and again, that's limited by our procedural
8 rules. We have lots of rules that we have to
9 operate in accordance with. So, having done
10 that, we are now at the point, members of the
11 jury, where the case is in your hands.

12 You two ladies stay seated, and the
13 rest of you step out.

14 (Whereupon, at 2:13 p.m., the jury
15 retired to the jury room to begin
16 deliberations.)

17 THE COURT: I have to swear the
18 tipstaves. Let's do that.

19 (Whereupon the tipstaves were sworn.)

20 THE COURT: Thank you very much.

21 (Whereupon, the following discussion
22 occurred outside the presence of the jury:)

23 THE COURT: Take a seat, everybody.
24 Ladies, I'm going to impose an additional
25 burden on the two of you, but it is going to be

1 a somewhat modified burden. I do not want
2 either one of you to speak to anyone about the
3 case or to speak to each other about the case
4 until such time as we have a verdict in this
5 matter. Some judges keep alternates around in
6 case there would be a problem in the jury room;
7 that something would happen to one of the
8 jurors and all of a sudden we need to plug an
9 alternate in. I'm not going to do that because
10 we have your phone numbers and we know where we
11 can get you, because, if something were to
12 happen to one of the jurors, deliberations
13 would have to start all over with the alternate
14 juror. So what I'm going to do is make sure we
15 have the correct phone numbers and where we
16 could reach you. If you have cell phones, I
17 would ask that you keep them on in the event
18 that something would happen. I'm not
19 anticipating that anything would happen. No
20 one anticipated that Ms. Mulfinger's husband
21 would have a health issue, but it happens. So,
22 out of an abundance of caution on my part,
23 because, having gotten this far, I would not
24 want something to happen to a juror and have to
25 start all over again. So, with that in mind,

1 I'm going to say to you, you are free to go
2 about your business. If we need you, we will
3 reach out and touch you for sure. Probably a
4 deputy will come and give you a ride here. We
5 won't not have them put the lights on when they
6 arrive at the house to keep the neighbors
7 happy, but please do not discuss the matter
8 with anyone or permit anyone to discuss it with
9 you. Once we have a verdict, we'll let you
10 know, and then you're free to talk to anybody
11 about anything you want. Okay. Thank you,
12 ladies.

13 (Whereupon, the alternate jurors were
14 excused.)

15 (Whereupon, a discussion was held off
16 the record.)

17 THE COURT: We didn't get the answer
18 on the record as to whether, with regard to the
19 whistleblower, the Court can have more than the
20 time frame indicated in the Rules of Procedure
21 to file its opinion since we have to make
22 findings of fact and conclusions of law.

23 MS. CONRAD: Your Honor, I don't
24 anticipate an issue, but I need to consult with
25 my client.

1 THE COURT: Okay. So --

2 MR. STROKOFF: Can we have an outside
3 time, Your Honor, 30 days?

4 THE COURT: You will definitely have
5 something within 30 days, but you are not going
6 to have it within a week.

7 MR. STROKOFF: No, I have no problem -
8 -

9 THE COURT: But you will definitely
10 have it in probably 30 days.

11 MR. STROKOFF: No problem with 30 days
12 from the plaintiff's standpoint, Your Honor.

13 MS. CONRAD: That's fine, sir.

14 THE COURT: Okay. Fine. So the two
15 of you can talk. You have already indicated,
16 Mr. Strokoff, you don't think you're going to
17 be filing any supplemental information, and
18 again, you are free to submit proposed
19 findings, et cetera. I'm not requiring it.
20 You can submit memos if you want. I'm not
21 requiring it. You can have oral argument if
22 you want. That is up to you folks. But if
23 we're going to do the oral argument, I would
24 prefer that it be done tomorrow, because I have
25 already told you my November is chock-full

1 already, and I will be doing this as catch-as-
2 catch-can in the interim.

3 MS. CONRAD: Thank you, sir.

4 (Recess)

5
6 (Whereupon, the following discussion
7 occurred outside the presence of the jury:)

8 THE COURT: All right, counsel, it
9 appears that juror number two, Ms. Lenz, is the
10 foreperson of the jury, and she has sent out a
11 note. "We would like to see Spanier's
12 statement," which I think is fine. Does either
13 side object to Spanier's statement?

14 MS. CONRAD: Do you propose D20?

15 THE COURT: You have to speak up.

16 MS. CONRAD: You would propose D20 to
17 be sent out, which is the Spanier statement,
18 D20, P38?

19 MR. STROKOFF: And, Your Honor,
20 Plaintiffs 39 is the one that has the
21 attorneys' comments on it.

22 THE COURT: Okay. What is the
23 difference between his exhibit and your
24 exhibit, Ms. Conrad, if you're saying yours
25 should go out as opposed to his?

1 MS. CONRAD: D20, which is also P38,
2 is the statement from President Spanier. What
3 Attorney Strokoff is proposing is the statement
4 plus the added-on comments from the attorneys
5 for Mr. Curley and Mr. Schulz.

6 THE COURT: But that is the statement
7 that went out.

8 MS. CONRAD: So is the first
9 statement, sir. That is the original
10 statement.

11 THE COURT: But the add-on statement
12 also went out.

13 MS. CONRAD: I guess the question is
14 which one does the jury want to see?

15 THE COURT: Okay. So then they asked,
16 "Also, is the Spanier statement the only thing
17 to consider in the defamation claim or can we
18 consider other factors, such as other actions
19 taken by Penn State?"

20 MS. CONRAD: It is my understanding
21 the defamation claim is based solely on the
22 Spanier statement.

23 MR. STROKOFF: But there's also the
24 discussion that he had with the athletic
25 department on Monday that is part of the

1 defamation, Your Honor.

2 MS. CONRAD: But there are no
3 documents related to that meeting, sir.

4 THE COURT: Pardon me?

5 MS. CONRAD: There are no documents
6 related to that.

7 THE COURT: They're not asking about
8 documents. They're saying can we consider it,
9 and I think it is proper for them to consider
10 that Dr. Spanier called together first all of
11 the coaches and thereafter all of the athletic
12 department and reiterated what was set forth in
13 the statement.

14 MR. STROKOFF: But, Your Honor, in
15 furtherance of Exhibit 39, 39 has all the
16 links, the Twitter and stuff like that that
17 were testified about.

18 THE COURT: Okay.

19 MS. CONRAD: The amendment, however,
20 sir, the two amendments, are not statements by
21 Spanier.

22 THE COURT: So I am going to respond
23 and see what kind of reaction we get.

24 MS. CONRAD: One last point, the
25 entire complaint is premised on Exhibit C to

1 the complaint, which is the Spanier statement
2 as contained on D20, P38. That is the
3 statement at issue in this case.

4 THE COURT: All right. So, if I
5 respond by attaching the Spanier statement and
6 say, "Is this the statement you wanted?" that
7 will get us to whether they want to see the
8 second statement without any harm being done to
9 either side, and I would propose to respond
10 that they can consider the meetings between Dr.
11 Spanier and the athletic department as they
12 recall them to be.

13 MS. CONRAD: Yes, sir. The complaint
14 refers to the president's statement to the
15 members of the athletic department staff on
16 November 7.

17 MR. STROKOFF: I think we have an
18 agreement, Your Honor.

19 THE COURT: Okay. Amazing. You can
20 agree to something. Now, do one of you have a
21 neutral-colored pad that I could write on that
22 neither side could say, "I want yellow and I
23 want white"?

24 MR. FLEMING: Do you want neutral or
25 yellow or white?

1 THE COURT: I'm going with yellow for
2 the moment, counsel.

3 MR. FLEMING: Okay. Just checking,
4 Judge.

5 THE COURT: Okay.

6 What was the date of that meeting?
7 That was a Monday.

8 MS. CONRAD: November 7.

9 THE COURT: Unfortunately, my printing
10 is not quite as good as Ms. Lenz, but I'm going
11 to say, "Is this the statement you want?" And
12 we're going to attach the Spanier statement,
13 the original one, and I also state, "You may
14 also consider Dr. Spanier's meetings with the
15 coaches and athletic staff on Monday, November
16 7."

17 MS. CONRAD: Yes, sir.

18 THE COURT: Okay.

19 Do you want to make a photocopy of
20 this so we have everything? We need a
21 photocopy of that so everybody is on the same
22 page.

23 That will be marked Court Exhibit No.
24 3 and our response will be Court Exhibit No. 4.
25 I have to hold your pad up to the light, Ms.

1 Conrad, just to make sure there's no subtle
2 White and Williams contained on the yellow
3 lines.

4 MS. CONRAD: Would you like me to
5 check, sir?

6 THE COURT: Pardon me?

7 MS. CONRAD: Do you want me to check?

8 THE COURT: I checked.

9 MS. CONRAD: Thank you.

10 THE COURT: Okay. So where is our --
11 yeah. You can just give that to them.

12 Okay. So here's a copy for each of
13 you, and this is the Court exhibit. Now we're
14 off the record for the moment.

15 (Recess)

16 (Whereupon, the following discussion
17 occurred outside the presence of the jury:)

18 THE COURT: Ms. Lenz now has two
19 additional questions: "Can we consider
20 placement of McQueary on paid administrative
21 leave and banishment from Penn State University
22 football facilities under the realm of
23 defamation?"

24 MS. CONRAD: No, sir. That is not the
25 claim that is alleged in the complaint, and as

1 a result, that is not a question for the jury

2 MR. STROKOFF: I think that is
3 properly within the whistleblower realm, Your
4 Honor.

5 THE COURT: Pardon me?

6 MR. STROKOFF: I think that is
7 properly within the whistleblower realm.

8 THE COURT: Okay. So you agree that
9 the answer is no?

10 MR. STROKOFF: That's correct.

11 THE COURT: Okay. Question number
12 two: "We would also like a brief clarification
13 on the definition of misrepresentation." So
14 what I will do is I will reread the
15 misrepresentation charge. Okay. So tell them
16 to bring the jury in, please.

17 (Whereupon, at 5:01 p.m., the jury
18 entered the courtroom.)

19 THE COURT: Go ahead and be seated,
20 please. Ms. Lenz, your printing is much better
21 than mine. Well, you didn't have to nod in
22 agreement. You could have, you know, faked it
23 and said, "No, yours is good." All right. You
24 have asked me two questions: Can we consider
25 placement of McQueary on paid administrative

1 leave and banishment from PSU football
2 facilities under the real of defamation? No.

3 Question number two: We would also
4 like a brief clarification on the definition of
5 misrepresentation. So I will reread that
6 instruction to you.

7 Ms. Furl, I see you have your pad and
8 pencil handy. Put them aside, and we're going
9 to have to go with our memory. I will be happy
10 to explain it to you as many times as
11 necessary. Okay. So the elements of
12 intentional misrepresentation which the
13 plaintiff must prove by clear and convincing
14 evidence are as follows: A representation --
15 in other words, he is told something -- that
16 the representation is material to the
17 transaction at hand, so it's important to the
18 transaction; that it was made falsely with
19 knowledge of its falsity or recklessness as to
20 whether it is true or false, so the
21 representation, with the intent of misleading
22 another into relying upon it; that there was
23 justifiable reliance on Mr. McQueary's part of
24 the misrepresentation and that the resulting
25 injury he suffered was proximately caused by

1 his reliance on the representation. Again, I
2 indicated to you that, if you find as a fact
3 that Mr. McQueary told Mr. Curley and/or Mr.
4 Schulz and neither one of them told Dr. Spanier
5 that the conduct he observed was sexual in
6 nature, that they are mandated reporters and
7 appropriate action and proper investigation
8 would include reporting it to the police and
9 DPW or Children and Youth Services, the
10 appropriate agency.

11 A misrepresentation is any assertion
12 by words or conduct that is not in accordance
13 with the facts. A misleading representation is
14 an assertion by words or conduct that is likely
15 to mislead another regarding the facts. A fact
16 is material if it is one that would be of
17 importance to a reasonable person in deciding
18 on a course of action. A material fact,
19 however, need not be the sole or even a
20 substantial factor in inducing or influencing a
21 reasonable person's decision. A fact is also
22 material if the person who fails to disclose it
23 knows that the person to whom it is made is
24 likely to regard it as important even though a
25 reasonable person would not regard it as

1 important. Reliance means a person would not
2 have acted as he did or would not have failed
3 to act unless he considered the
4 misrepresentation or misleading representation
5 to be true.

6 Does that answer your question for
7 you? While I have you out here, I was not
8 going to do it, but I guess I will do it now.
9 Have you given any thought to dinner? because I
10 understand, as with lunch, you need some
11 advance notice, and what I would suggest to you
12 is that you go back, and Ms. Lenz, if you
13 decide that you would like to have menus, you
14 know, you can -- do they have the menus
15 already? You have menus. Okay. So, if you're
16 interested in dinner, you want to fill out the
17 menus, knock on the door, and give them to the
18 court officer. If you're not interested in
19 dinner at the moment, keep deliberating until
20 you get to a point where you think you might be
21 getting hungry, and we will go from there. Is
22 that satisfactory to everybody?

23 Thank you. Go ahead and step out.

24 (Whereupon, the jury returned to the
25 jury room to resume deliberations.)

1 THE COURT: See you later.

2 (Recess)

3 THE COURT: Go ahead and seat the
4 jury. We have a verdict.

5 MS. CONRAD: Your Honor, may we
6 approach?

7 THE COURT: Yes.

8 (Whereupon, the following discussion
9 was held at sidebar:)

10 MS. CONRAD: I wanted to confirm that
11 the no public statements would continue to be
12 in effect in light of the fact that Your Honor
13 will be deciding --

14 THE COURT: I would hope so.

15 MS. CONRAD: Thank you.

16 (End of sidebar discussion)

17 (Whereupon, at 6:26 p.m., the jury
18 returned with a verdict.)

19 THE COURT: If everyone except Ms.
20 Lenz would take a seat, Ms. Lenz, one of the
21 things I find by being in a different county is
22 things are done differently, so it's done a
23 little differently in our county, but we will
24 proceed to go ahead and take the verdict
25 ourselves. With regard to question number one,

1 defamation, do you find in favor of the
2 plaintiff?

3 THE FOREPERSON: Yes.

4 THE COURT: Yes. If you answer yes,
5 what amount of damages do you award for
6 compensatory damages?

7 THE FOREPERSON: 1,150,000.

8 THE COURT: Okay. What award do you
9 give for punitive damages?

10 THE FOREPERSON: Zero.

11 THE COURT: Zero. With regard to
12 question number two, misrepresentation, do you
13 find in favor of plaintiff?

14 THE FOREPERSON: Yes.

15 THE COURT: Okay. Having answered
16 yes, what amount of damages do you award for
17 compensatory damages?

18 THE FOREPERSON: 1,150,000.

19 THE COURT: What amount do you award
20 for punitive damages?

21 THE FOREPERSON: Five million.

22 THE COURT: Okay. Harken to your
23 verdict as the Court has recorded it, you say,
24 in regard to Count 1, defamation, that you find
25 in favor of plaintiff and award compensatory

1 damages of \$1,150,000?

2 THE FOREPERSON: Yes.

3 THE COURT: And, as to Count 2,
4 misrepresentation, you find in favor of the
5 plaintiff, and you award compensatory damages
6 of \$1,150,000 and punitive damages of \$5
7 million; is that right.

8 THE FOREPERSON: Correct.

9 THE COURT: Okay. Do you want them
10 polled?

11 MS. CONRAD: No, sir.

12 THE COURT: No. Have a seat, please,
13 ma'am. On behalf of the Court, the county, and
14 counsel, we want to thank you for your
15 services. It is my practice to always go back
16 and address the jurors when a case is over.
17 This will be the first time in 31 years when I
18 cannot do that, because I still have to decide
19 the whistleblower claim, and it would be
20 inappropriate, in my view, for me to come back
21 and have any conversation with you with regard
22 to how you reached your verdict in this matter.

23 I want to say to you that the Court,
24 the county, and the parties appreciate the
25 effort that you gave. You certainly were in a

1 difficult situation, and you did exactly what
2 you said. You well and truly tried the case in
3 accordance with the facts and the law as you
4 found it, so I thank you very much for your
5 service.

6 Now, we all would be blind if we did
7 not see more press here than we saw the last
8 couple days, and the press likes to talk with
9 jurors when a case is over. The lawyers like
10 to talk to them. You are under no requirement
11 whatsoever to talk to anybody about your
12 verdict. If you do not want to talk to
13 someone, you simply say, "I don't want to talk
14 to you," and you go about your business. I
15 don't know how security works here, but in our
16 county at night the sheriffs will escort you to
17 your cars, and frankly I don't even know where
18 you parked here in town, but, in any event, I
19 see the sheriff is here with more than adequate
20 resources to get everyone to their position.
21 Again, on behalf of the Court, thank you very
22 much for your services, and I am sorry that I
23 cannot follow my practice, but I trust you
24 understand why.

25 Have a good evening. Thank you.

1 (Whereupon, the jury was excused.)

2 THE COURT: All right, counsel, thank
3 you very much.

4 E N D O F P R O C E E D I N G S

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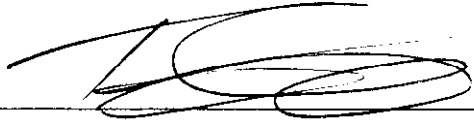
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25

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me upon the hearing of the within matter and that this copy is a correct transcript of the same.

Date


Thomas C. Bitsko, CVR-CM-M
Official Reporter

C E R T I F I C A T E

I hereby certify that a copy of this transcript was made available to counsel of record for the parties, advising they had until 11/3/14 in which to file any objections or exceptions to the same. That time period having elapsed without recording of objections or exceptions, the transcript is therefore lodged with the Court for further action.

Date


Thomas C. Bitsko, CVR-CM-M
Official Reporter

A C C E P T A N C E B Y C O U R T

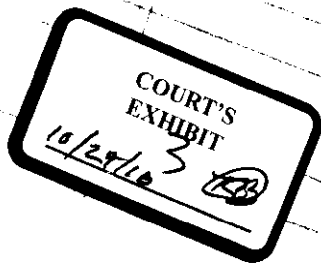
Upon counsel's opportunity to review and
to offer objections to the record, the
foregoing record of proceedings is hereby
accepted and directed to be filed.

3 November 2016 Thomas G. Gavin

Date Thomas G. Gavin, Senior Judge
 Specially Presiding
 15th Judicial District

We would like to see
Spanier's statement.
Also, is the Spanier
statement the only thing
to consider in the
defamation claim or can
we consider other factors
such as other actions
taken by Penn State?

Barbara Perry



27 Oct 2016

IS THIS THE STATEMENT YOU
WANT?

YOU MAY ALSO CONSIDER DR.
SPANIER'S MEETINGS WITH THE
COACHES AND ATHLETIC STAFF ON
MONDAY, NOV 7.

Garvin
SJ

COURT'S
EXHIBIT

10/22/16 4 EB



Statement from President Spanier

Statement from President Spanier

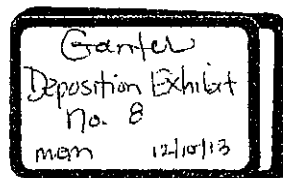
Saturday, November 5, 2011

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.

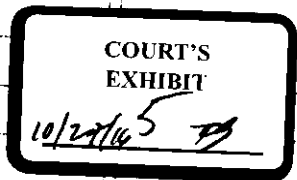
Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

Graham Spanier



① Can we consider placement of M'Queary on paid administrative leave and banishment from ^{PSU} football facilities under the realm of defamation?

② We'd also like a brief clarification on the definition of misrepresentation?



Leanne Levy