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



ORIGINAL

MICHAEL J. MCQUEARY

: NO. 2012-1804

VS

THE PENNSYLVANIA STATE UNIVERSITY

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TRANSCRIPT OF PROCEEDINGS
(JURY TRIAL A.M.)

BEFORE: THOMAS G. GAVIN, SENIOR JUDGE
SPECIALLY PRESIDING
15TH JUDICIAL DISTRICT

DATE: OCTOBER 17, 2016

PLACE: CENTRE COUNTY COURTHOUSE ANNEX
ANNEX COURTROOM
108 SOUTH ALLEGHENY STREET
BELLEFONTE, PA 16823

APPEARANCES:

FOR THE PLAINTIFF:
ELLIOTT STROKOFF, ESQUIRE
WILLIAM T. FLEMING, ESQUIRE

FOR THE DEFENDANT:
NANCY CONRAD, ESQUIRE
GEORGE MORRISON, ESQUIRE
KIMBERLY HAVEAR, ESQUIRE

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CENTRE COUNTY, PA



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NOTES BY: JENNIFER AMENTLER
OFFICIAL COURT REPORTER
ROOM 101, CENTRE COUNTY COURTHOUSE
BELLEFONTE, PA 16823
814 355-6734 or FAX 814 548-1158

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	Direct	Cross	Redirect	Recross
For Plaintiff:				
Jonelle Harter	70	92	107	112
Eshbach				
For Defendant				
(None)				

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P R O C E E D I N G S

(Whereupon, the jury was sworn.)

THE COURT: Good morning, ladies and gentlemen. I'm going to proceed to have some opening comments. And at the conclusion of that, you're going to hear from the attorneys and then we will move forward with the actual trial.

You have been selected to perform a most solemn duty of citizenship. You will hear and decide the civil case brought by Mr. McQueary against The Pennsylvania State University.

The service you render as jurors is as important to the administration of justice as are those rendered by myself as trial judge and by the attorneys for the parties.

Please pay close attention to all that is said and all that occurs throughout the trial so that at the conclusion of the trial, you will be in a position to fulfill your oath as a juror.

I'm holding up a white paper. There's nothing on either side of this paper. At this moment, this is how your mind should be. Any preconceived ideas that you have about this case are gone. On this sheet of paper, as various witnesses come in, you are going to write down what you believe are the

1 appropriate facts. You're going to do that mentally
2 or in your notebooks. But any pre conceived idea
3 that you had about this case is out. We're starting
4 with a clean sheet of paper, and you are going to
5 hear, firsthand, the information that the parties
6 are going to provide. And based on that, you're
7 going to make your decision.

8 A trial is governed by a series of rules,
9 procedural rules, rules of evidence, substantive
10 rules. The substantive rules are simply the
11 elements of the cause of action that the plaintiff
12 has, he has to prove certain things. I'm going to
13 discuss each of these in varying degrees in my
14 opening comments. And of course, in my open closing
15 comments, I will discuss them in even greater
16 detail.

17 It is also my practice not to discuss the law
18 in any great detail at this point but as points come
19 up during the trial where I think an explanation
20 will be helpful, I will take the time to instruct
21 you on the law at that point in time.

22 Also, I want to try and set your mind at ease.
23 In your every day encounters with people, you are
24 evaluating them to decide whether you believe what
25 they have to say and whether you are going to act on

1 it. So you are being asked to do today and in the
2 ensuing days in a very formal setting exactly what
3 you do every day of your life. You're going to meet
4 people, they're going to share information with you,
5 you're going to decide whether you believe them and
6 what you believe, and ultimately, you're going to
7 make some decision based on that information.

8 The only difference is the setting. At work
9 today, if you were there, someone would come up and
10 they would give you information. You'd never met
11 them before, you'd evaluate them and you'd decide
12 what you're going to do. And you do that
13 subconsciously. Here, we want you to very
14 consciously look at people, evaluate people, decide
15 who and what you believe.

16 The first rule, and the most important rule,
17 is that you keep an open mind throughout the trial.
18 Do not make up your mind about what your verdict
19 will be until the end of the trial when you have
20 heard all of the evidence and after I have explained
21 the Rules of Law to you.

22 No single witness can provide all of the
23 evidence you will need to decide this case. It has
24 to be given to you witness by witness, question by
25 question, and answer by answer. And you will not

1 have all of that information until you have heard
2 from all of the witnesses in this case.

3 You are not to talk to each other about the
4 evidence or about the other matters relating to the
5 case until I send you to the jury room to deliberate
6 upon your verdict. So from this moment forward, you
7 are an independent operator. You're making your own
8 evaluation of the witness. You're deciding what
9 testimony, if any, you want to believe and you're
10 storing it in the back of your mind. And each of
11 you is doing that with the expectation that at the
12 end of the trial, you'll go into the jury room,
13 you'll sit down and everyone will put in front of
14 them the facts that they believe to be correct. And
15 you will then have a discussion of your facts, the
16 other jurors' facts, and you will hopefully come to
17 a common set of facts that you will apply to the law
18 to render your verdict in the case.

19 Even after you have heard all of the evidence
20 in the case, you're still not ready to decide it
21 because, of course, you need to hear the closing
22 arguments of the lawyers and the instructions of the
23 Court. Only then are you permitted to discuss with
24 your fellow jurors the facts and the law with the
25 expectation of reaching a verdict.

1 Now, one of the problems of being a juror is
2 when you go home everybody's going to say what
3 happened? What was going on? Who said what? And
4 what did you think? And you can't answer any of
5 those questions because, again, you're keeping your
6 own counsel. Certainly when the case is over,
7 you're going to be free to talk to whomever you want
8 to about the case and the witnesses and anything
9 else. But until we've reached the point where a
10 verdict has been entered, each of you must keep your
11 own counsel.

12 And again, I understand that it is human
13 nature. And I'm certain that when you go into the
14 jury room you really do want to discuss with other
15 people, especially in the early goings, what's your
16 sense, what do you think is going on. But I implore
17 you not to do that. Each of you has to keep your
18 own counsel. You're not influencing any other
19 witness or any other juror until you get to the
20 deliberation process, then of course each juror can
21 explain why I believe this witness and why I think
22 you should accept the witness -- what the witness
23 said and why you should act in a certain manner.
24 And then you can hear what everybody else has to say
25 with the idea of coming to a common set of facts.

1 I indicated when we talked the other day that
2 you should not talk to any of the lawyers, the
3 parties, the witnesses, and in fact, avoid us. We
4 will avoid you. We're not being rude, it's just if
5 you're seen talking to somebody, I have a lot of
6 questions that I have to go through and it's just
7 easier to avoid that process.

8 I think it might be helpful, because we're in
9 a very small town and there are very few eating
10 establishments, if you go out to eat that you keep
11 your juror button on because you never know who's
12 going to be seated at the next table. If you don't
13 have a juror button on, it may be someone who's
14 coming as a witness and they're talking freely,
15 which they would not do if they knew you were a
16 juror. And again, the attorneys have advised their
17 witnesses, stay away from the jurors. So please
18 keep your juror button on at all times.

19 Now we have to talk for a minute about the
20 real world in which we live, and that is the world
21 of media, internet, and all of those other matters.
22 Please do not read anything about the case. Do not
23 listen to anything about the case. If you happen to
24 hear something on the radio, go to another station,
25 on the TV, go to another station.

1 I assume all of you have computers and you use
2 them and some of you may go on Facebook and all of
3 those other social media that I know nothing about
4 but I know many people do. You can't go on any of
5 those because other people may be commenting. There
6 may be people who are sitting in the courtroom
7 saying, wow, I heard this witness and this witness
8 said X, Y, or Z.

9 And again, the reason is simple, 12 of you are
10 going to make the decision in this case. And the 12
11 of you all need to have heard the witness directly,
12 the direct examination, the cross-examination, the
13 ability to look the person in the eye to make all
14 those credibility determinations. And that's the
15 basis of the information that you're going to decide
16 the case on. Not based on what's posted on social
17 media. Not what's based on any independent
18 research.

19 And obviously, everyone can go and do
20 independent research. You can look up every legal
21 definition. You can look up virtually anything
22 about the law. But if you do that, you violated
23 your oath as a juror because that subtlety is going
24 to impact you in how you decide the case, and you've
25 done that independent of your fellow jurors. While

1 each of you ask independently coming to your own
2 conclusions while you observe the person who
3 testifies, at least you all had the opportunity to
4 observe the person and to draw your own conclusions
5 from that interaction. So please, stay away from
6 the internet until the trial is over. Then of
7 course you're free to look at it all you want.

8 Now, I like to tell jurors that I view you all
9 as a clinician. You're sitting there and
10 information is being given to you and you're pulling
11 out the information that you believe to be credible.
12 And with regard to what a witness has to say, you
13 can believe everything they say, none of what they
14 say, or some of what they say and you make that
15 decision based on the rules of credibility.

16 But what you have is you have information
17 streaming by and you're pulling it out. And you're
18 making that decision without any sympathy or bias
19 one way or the other. This is a court of law.
20 There is no room for sympathy or bias or prejudice
21 or anything else. This is pure analysis. What are
22 the facts? How do those facts apply to the law?
23 What do the facts apply to the law mean with regard
24 to what the verdict should be? And the verdict
25 should be the verdict that is based on the facts on

1 the law, not based on any bias, not based on any
2 prejudice, not based on any emotion. It's called
3 clinical analysis that you're being asked to do.

4 A further reason why the evidence is to be
5 presented here in open court is that this is really
6 a public process. The parties have been unable to
7 resolve they're dispute, so they have brought it to
8 you to decide. And the process should be conducted
9 in an open, public, fair manner. And again, that's
10 the reason why you don't do any outside research.

11 A couple terms that will be helpful to you.
12 The plaintiff, of course, is Mr. McQueary. And as
13 to any issue that Mr. McQueary is attempting to
14 convince you of, he has the burden of proof, the
15 burden of persuasion to convincing you that his
16 position is correct.

17 The defendant is The Pennsylvania State
18 University, and the same holds true with them. As
19 to any defense that they're asserting, they would
20 have the burden of establishing that defense. I
21 will talk about the appropriate burdens of proof in
22 my closing argument, there's no point in getting
23 into those burdens of proof at this point in time.

24 When I finish my comments, the parties will
25 have an opportunity to make what's called an opening

1 statement. We've all gone to the movies. To my
2 mind, an opening statement is like the clips that
3 they run about coming attractions. They're going to
4 give you some information about an upcoming movie,
5 and they're going to give you enough information
6 that you want to come back and see it. Well, that's
7 essentially what an opening statement is.

8 The attorneys are going to tell you who the
9 witnesses are in the case, what they're going to be
10 talking about so that when they do, in fact, appear,
11 you will know where they fit in and you'll be able
12 to follow the theme of the case. Once the attorneys
13 complete their opening statements, we will then
14 begin with the testimony. The nature of a trial,
15 going back to why you have to keep an open mind is
16 that the plaintiff gets to go first and the
17 plaintiff gets to present all of its evidence before
18 the defense gets to present any of its evidence. So
19 obviously, you can't make up your mind about
20 anything until you've heard both the plaintiff's
21 case and the defendant's case.

22 Now, a further comment about the opening
23 statements of the attorneys. They are not evidence.
24 And it is important that you keep that in mind. The
25 only evidence comes from the mouths of the

1 witnesses. So the people who come over here, raise
2 their hand and swear to tell the truth and whom you
3 evaluate, that's the evidence in the case. The
4 opening statements of the lawyers are not evidence.
5 The closing statements are not evidence. The
6 questions of the lawyers are not evidence. The
7 answers of the witness constitute the evidence.

8 So if someone asked a five-paragraph question
9 and the witness says yes, the evidence is yes, not
10 the five paragraph question. So when we get
11 underway, your focus is on the person seated here
12 and your evaluation of that person and what that
13 person is saying.

14 Now, evidence. We want to talk about evidence
15 for a moment. And we have rules of evidence. And
16 one of the issues that often bother witnesses is
17 objections by attorneys.

18 So a witness is asked a question and there's
19 an objection. And many times jurors will say well,
20 why didn't they want me to hear what the answer to
21 that question was going to be. And the reason is
22 that we have rules of evidence. Actually, the rules
23 of evidence we have have come over to us from old
24 England, they've been in place for four to five
25 hundred years. We have codified them in

1 Pennsylvania to a book about that thick. And
2 everybody knows what the rules are, but still
3 sometimes questions are asked that are not
4 appropriate under the rules.

5 So when an attorney objects, he or she is
6 simply saying that this is not a permissible
7 question under our rules of evidence. And nobody's
8 hiding anything, they're simply saying follow the
9 rules.

10 And the example I always like to use about why
11 do we have to follow the rules is that it's very
12 late at night, you're coming home, you know there's
13 not another car on the road and there's that stop
14 sign right before you turn the corner to go into
15 your driveway. There's not another car on the road
16 and you decide I'm just going to slide through that
17 stop sign, I'm not coming to a complete stop. Sure
18 enough, the police officer is there and he sees you
19 and you get out and you begin your explanation, it's
20 late at night, there's not another car on the road,
21 there's nothing the matter with me. And he just
22 puts up his hand and says stop, I don't want to hear
23 about it, it's a stop sign, you can't go there.
24 Well, that's what rules of evidence are. They're
25 the judicial equivalent of a stop sign.

1 And the lawyer is simply saying that's not a
2 permissible question under our rules. If I agree
3 with the attorney, I will sustain the objection
4 which means the question does not get answered. If
5 I disagree, I overrule it and the witness can answer
6 the question.

7 Sometimes the witness will answer before the
8 objection can be fully stated, in which case I may
9 ask you to disregard the answer of the witness which
10 is sort of hard. It's the old expression, the cat's
11 out of the bag, how do you put the cat back in the
12 bag? But I'm going to assume that you will be able
13 to do that and you will follow my instructions and
14 that you will listen only to the evidence that is
15 properly admitted.

16 Also, as we're going along, if you miss
17 something, get a hand up and I will have the
18 reporter read the question and answer back to you.
19 I tell you that because when you go to the jury
20 room, I will not repeat, will not have any testimony
21 read back to you for any reason whatsoever. So when
22 you go to the jury room, it is your individual and
23 collective memory upon which you must rely.

24 Now, I want to talk about notes for a moment.
25 You're not permitted to take notes during the

1 opening statements of the lawyers or their closing
2 statements. And the reason is, your notes are to
3 refresh your memory as to the evidence. Again,
4 opening statements and closing statements are not
5 evidence, it's just what the attorneys have to say.
6 The evidence comes from the witnesses who are here.
7 So again, you will be permitted to make notes of
8 what the witnesses have to say.

9 So when we talk about note taking, we all have
10 to hearten back to our days in school. And you can
11 either take a lot of notes, you can take a few
12 notes, or some people are really good and they don't
13 have to take any notes. So I don't know where you
14 all fall within that range.

15 The important thing that we do know from our
16 school days, however, is that oftentimes while we're
17 writing something down, something more important is
18 being said and we're missing that while we're
19 writing what we were writing down. So you need to
20 be judicious in how you take your notes.

21 Also, with regard to note taking, there's no
22 requirement that you do it. The process will be
23 that you make your notes as you're going along.
24 When we take a break, you just leave your notes on
25 your seat. When we break for lunch, the notebooks

1 will be collected and secured. We'll go through
2 that process until the end of the trial and you
3 begin your deliberations.

4 Just as you can't share your oral thoughts on
5 what a witness had to say and your impression of
6 them, you're not to share your notes with anybody
7 until you go to the jury room. Then of course you
8 can open up your notebook and use it to refresh your
9 recollection.

10 In the course of your deliberations, the fact
11 that one juror took notes and another juror did not
12 take notes, when it comes to discussing a particular
13 witness, the fact that one juror wrote down what
14 they believe that witness had to say and the other
15 juror did not write anything down as to what they
16 believed the witness had to say does not mean that
17 the one who wrote it down is entitled to more
18 weight. Again, it's an aid to you to refresh your
19 recollection. The note takers get no more weight in
20 their credibility assessment of the witnesses than
21 the folks who do not take any notes.

22 Once the trial is over, your notes are
23 collected and destroyed. No one will ever see your
24 notes. I tried a case in my county and I noticed
25 this one person furiously taking notes. And at the

1 end of the trial he came up to me with his notebook
2 and he said I want you to see what I've been doing.
3 I said no, no, I can't look at your notes, I'm not
4 permitted to see your notes. He said I wasn't
5 making notes, I was drawing pictures of you, and he
6 had all these pictures of me. And I'm thinking oh
7 my heavens. So if you draw pictures, keep them to
8 yourself. And again, with the notes, the note
9 takers, no more sway than the non-note takers.

10 Now again, when I rule on objections, you need
11 to understand that I am ruling simply on the legal
12 question. This question is not permissible for this
13 reason. I'm not taking any position about where the
14 question is going or anything else.

15 So my job is sort of like the umpire at a ball
16 game, I'm calling balls and strikes. If I do my job
17 properly, you'll hear everything that you should
18 hear and nothing you should not hear. But that's my
19 sole job, I have no interest in either side of the
20 case. If it's a strike, it's a strike. If it's a
21 ball, it's a ball. So again, don't read anything
22 into any of my rulings, why did he rule this way,
23 why did he rule that way. I'm ruling as I believe
24 the law required me to rule.

25 Sometimes the attorneys and I need to speak

1 without you being able to hear what we're talking
2 about. It's called a sidebar conference. And here,
3 I'm told that we will do it right here at the corner
4 of the bench. And that Centre County has a
5 wonderful device that creates white noise. So we
6 can hear each other, but you can't hear us. In any
7 event, when we go over there to hide the sidebar
8 conference, have in mind we don't want you to hear
9 what we're talking about, so use the opportunity to
10 stand up and stretch, chat among yourselves about
11 whatever you want to chat about, other than the
12 case, and we'll discuss what it is that we need to
13 discuss and move on from there.

14 Now, we go back to the beginning where I said
15 what you're doing in a formal setting today is what
16 you do every day of your life. You're meeting
17 people and you're making credibility determinations.
18 So this is what you're getting your \$9.00 a day for,
19 or your \$25 a day when we hit the magic number. And
20 what you need to keep in mind is that if I send you
21 back into the jury room right now and said each one
22 of you state the factors that you believe are
23 important in assessing a person's credibility, there
24 would be some common factors that you would come up.
25 And each of you would have some unique twists of

1 your own. So in a moment, I am going to talk to you
2 about some factors that the Court considers, because
3 sometimes judges hear a case by themselves and we
4 have a little mental checklist we go down. So you
5 can consider the list I'm going to give to you and
6 use that list by itself or in conjunction with your
7 own list or your own list. But what is important is
8 that the same set of criteria to determine
9 credibility is used on each witness. So whatever
10 standard you want to use, your own, the ones I
11 suggest, some combination thereof, that standard has
12 to be applied equally to each and every witness so
13 there's not an A standard and B standard. And I
14 don't anticipate that that would happen.

15 Now, here are some of the factors that you can
16 consider independently in conjunction with or on our
17 your own:

18 With regard to what a witness has to say, ask
19 yourself how well could the witness see, hear, or
20 know the things about which the witness testified,
21 how well did the witness remember and describe those
22 incidents. So if the witness has talked about it
23 several times, is the testimony consistent?

24 Are there variances? If so, why?

25 Was the ability of the witness to see, hear,

1 know, remember, or describe these things affected by
2 any condition of age or mental or intellectual
3 disability? In other words, what was their capacity
4 to see, observe, and hear?

5 In what manner did the witness testify? One
6 of the things that I think everybody does when
7 you're meeting in person and you're sizing them up,
8 you're doing exactly that, you're looking at them
9 and you're eyeballing them and you're saying how is
10 this person communicating with me? And part of
11 communication is both verbal and physical manner in
12 which they conduct themselves. You can tell a lot
13 by the person's body language in the communication
14 process.

15 So, how did the witness look and act while the
16 witness was testifying?

17 Was the witness's testimony uncertain,
18 confused, contradictory, or presented in an evasive
19 manner? On the other hand, was it positive and
20 assertive and unchanging through cross and direct
21 examination.

22 Ask yourself whether a witness has any
23 interest in the outcome of the case or whether the
24 witness indicated any bias or prejudice. Obviously
25 in this case, we're going to have witnesses who have

1 an interest in the outcome of the case. The fact
2 that you have an interest in the outcome of the case
3 doesn't necessarily mean that you're going to be
4 more credible or less credible about disputed
5 points, it is simply a factor that you should
6 consider when you're assessing that witness's
7 credibility.

8 If a witness demonstrates any bias or
9 prejudice, you have to ask yourself if so, in what
10 manner did that affect the witness's testimony and
11 how should you treat that? Also, ask yourself
12 whether a witness's testimony was contradicted or
13 supported by other witness's testimony or other
14 evidence.

15 Also, we mentioned the other day that the most
16 important thing you bring to the jury process is
17 your common sense. You didn't check your common
18 sense at the courthouse door when you arrived this
19 morning. Some things make sense. Some things don't
20 make sense. If that little wheel in the back of
21 your mind is saying to you this doesn't make sense,
22 listen to the wheel in the back of your mind because
23 your experience tells you that often that's a good
24 gauge of what's going on.

25 Again, you can believe everything a witness

1 said, some of what the witness said, or none of what
2 the witness said, and you will make that
3 determination based on your application of the rules
4 of credibility to the witness's testimony.

5 Also, to the extent that there are differences
6 between the testimony of witnesses, ask yourself, is
7 there an explanation for it? Again, a very common
8 example. You're at a big event and something
9 startling happens and then people start talking
10 about it and A, B, and C all have a different
11 version of what happened. And you're saying to
12 yourself, well, how do I reconcile that? And then
13 you say, well, wait a minute, A was standing over
14 here and B was standing over there and C was
15 standing over there and their view was different, so
16 that explains how it is that they can see this event
17 in a different manner.

18 On the other hand, if A and B were standing
19 right where the event occurred and both were capable
20 of seeing and hearing and recording what occurred
21 and they have a different view, then one of them is
22 incorrect or both of them is incorrect.

23 So when you are evaluating testimony of
24 witnesses and there's inconsistencies, ask yourself,
25 is there some way I can square up and explain these

1 inconsistencies? And if not, then you have to make
2 a credibility determination, which way am I going to
3 go? And also, ask yourself is the contradiction
4 about something major or minor a minor detail.

5 If you decide that a witness has been
6 intentionally misrepresenting a fact, in other
7 words, that you find that the witness's testimony
8 was untruthful on a significant point, you can on
9 that basis alone decide not to believe any of that
10 witness's testimony. But again, before you get to
11 that point, go through the analysis, say why is
12 there the variance, is there an explanation for it.
13 But if you ultimately come to the point someone is
14 flat out being untruthful, then of course you can
15 disregard all of that witness's testimony. You're
16 not required to do it, but you can.

17 Again, while I'm the Judge of the law and you
18 must accept and follow my rulings on all matters of
19 law, I am not the judges of the facts. Each of you
20 are going to make your own fact determination.
21 You're going to go back in the jury room at the end
22 of the trial and when you begin to deliberate, one
23 of you is going to be the foreperson of the jury and
24 that person is going to say well, let's go around
25 the table. Witness number one, what's our

1 impression of witness number one? Credible or not
2 credible and what facts are we going to rely upon.
3 And that's where each one of you will get an
4 opportunity to explain your viewpoint and to suggest
5 to your fellow jurors why your viewpoint is correct
6 or not.

7 One of the important things, though, when
8 you're involved in that process is that what we're
9 looking for is a mature juror. And a mature juror,
10 in my mind, is a juror who walks into the room, has
11 a view, but will listen with an open mind to what
12 somebody else has to say because it just might be
13 that somebody else did a better job of analyzing
14 that witness and coming up with the correct
15 evaluation of the witness and the witness's
16 testimony than you did. And if so, the mature juror
17 will say you know what, you're right, your analysis
18 was correct, mine's incorrect, I'm going to go with
19 that analysis. On the other hand, if you're
20 convinced that your analysis is absolutely correct,
21 by all means stick to your position.

22 Generally, at this point I would talk a little
23 bit about the legal principles that are going to
24 apply in this case. But I'm not going to do that
25 right now because one of the difficulties in doing

1 that is that I have to anticipate what it is that
2 the lawyers might say to you in their opening
3 statements. And I might anticipate wrongly and I
4 might say something that I ought not say at this
5 stage of the proceedings. So I'm going to let them
6 open. And then when they have finished their
7 opening statements, I'm going to give you some broad
8 brush strokes of what the legal issues are in the
9 case so that you will have an idea of what you're
10 looking for when the witnesses come up and testify,
11 because each of you in your own job you know that
12 you're looking for certain information. There's a
13 ton of information out there but you're looking for
14 certain information. You want to hear all the
15 information, but it's the certain information.

16 So I'll be able to give you some key
17 guidelines of legal points that you're looking for
18 in the case and then we'll begin with the testimony.

19 And again, members of the jury, the opening
20 statements are not evidence. It's a road map. And
21 it's what the attorneys think they are going to go
22 ahead and present. It doesn't necessarily mean that
23 that's what will actually be presented. So again,
24 it's like the feature coming attraction at the
25 movie, listen to what they have to say with the

1 understanding that you're going to have to sit
2 through the entire movie to see what, in fact, was
3 proven. Go ahead, Mr. Strokoff.

4 MR. STROKOFF: Thank you, Your Honor.

5 Good morning. Even though we all met last
6 week during the voir dire process, I'd like to
7 refresh your memory. My name is Elliott Strokoff, I
8 represent the plaintiff, Mike McQueary, along with
9 Tim Fleming on the other side of Plaintiff.

10 This case in terms of the basic facts are a
11 little bit more complicated than most of the cases
12 I've tried. And the reason is, it involves facts
13 and events, some of which occurred in the year 2001,
14 some of which occurred in the year 2011, and there's
15 even a flash back to 1998. So I think the first
16 thing I'd like to do before I get into what I think
17 is going to unfold is to identify some of the key
18 people who were involved in these events in 2001, in
19 2011, and 1998.

20 Building on Judge Gavin's analogy of a blank
21 piece of paper, I know I'm going to be identifying
22 some people who you probably know, but I'm going to
23 do it any way.

24 Mike McQueary, in 2001, was a graduate
25 assistant football coach for the Penn State football

1 team. And there will be witnesses who will explain
2 where on the totem pole a graduate assistant is.
3 It's all the way at the bottom. In the year 2011,
4 he was an assistant football coach, so he had been
5 promoted.

6 Graham Spanier was president of the University
7 in 2001. And Graham Spanier, again, until I think
8 it was November 8th or 9th of 2011 was president of
9 the University.

10 Gary Schultz. Mr. Schultz was vice president
11 of finance and something else in 2001. And in 1998.
12 And from September of 2011 until November 5 or so of
13 2011. So Mr. Schultz's name is going to come up.

14 Tim Curley was athletic director of Penn
15 State. That's the whole athletic department, which
16 includes the football team. He was athletic
17 director in 2001 until November 5 or so of 2011, and
18 also during the flashback period of 1998.

19 Tom Harmon was chief, I don't think that's his
20 official title, he was chief of the Penn State
21 University Police. It will come out during the
22 trial that Penn State had its own police force that
23 had jurisdiction over the main campus in State
24 College and Mr. Harmon was chief of the Penn State
25 Police. And he had a title director or something

1 like that in 1998, flashback period, and in 2001.
2 Mr. Harmon was not chief in 2011.

3 Joe Paterno was head football coach until
4 November 8th or 9th, 2011.

5 Tom Bradley was defensive coordinator for Penn
6 State for a period of time I believe beginning in
7 the year 2000. But Tom Bradley became acting head
8 football coach when Joe Paterno was fired. So Tom
9 Bradley was acting head football coach from about
10 November 9th, 2011 until January of 2012.

11 Mark Sherburne. Mark Sherburne was an
12 associate athletic director, so he was just under
13 Mr. Curley. And when Mr. Curley went on paid leave
14 in November 5 or so of 2011, Mr. Sherburne came in
15 as acting athletic director and served for a period
16 of about 12 days.

17 And then in the, I think it was November 17th
18 or so of 2011, Dave Joyner became acting athletic
19 director, who was acting athletic director for the
20 rest of the relevant time period in this lawsuit.

21 Fran Ganter was, in the period of time from
22 about 2004 until 2013, associate athletic director.
23 So Mr. Ganter would have served under Tim Curley and
24 also for a brief time under Mark Sherburne and then
25 thereafter, under Dave Joyner.

1 Lisa Powers. Lisa Powers, for the relevant
2 timeframe from the end of October 2011 through
3 November 5 or so of 2011, which is I'll explain why
4 that's an important timeframe, and beyond, she was
5 director of public information. So, she was in a PR
6 position, Lisa Powers.

7 Her boss, Bill Mann, was, during that
8 timeframe in 2011, vice president for University
9 relations. He was Lisa Powers' superior.

10 Steve Garban was, again, at this time period,
11 the end of October 2011 through the first week of
12 November 2011 and also beyond, was chairman of the
13 Penn State University Board.

14 Cynthia Baldwin. Cynthia Baldwin, in 2011,
15 was the Penn State University general counsel. She
16 was the senior attorney employed in house by The
17 Penn State University.

18 Penn State also had what we lawyers call
19 outside counsel. Outside counsel typically is a
20 lawyer who is in a private practice, private sector,
21 who is hired to provide advice. So you're not a
22 direct employee, you're hired to provide legal
23 advice on a specific matter or a specific series of
24 matters.

25 Penn State's general counsel in the year 2001

1 was Wendell Courtney with the firm of McQuaide
2 Blasko.

3 Erica Runkle was the HR department manager of
4 intercollegiate athletics. Again, Mr. Curley was
5 the director of intercollegiate athletics, the
6 athletic director. And Penn State, being as large
7 as it is, has a number of HR professionals attached
8 at different departments in addition to having an
9 essential HR department. Erica Runkle was the
10 athletic public relations professional.

11 Rodney Erickson succeeded Graham Spanier as
12 president of the University.

13 There are some other witnesses whose names I'm
14 not going to mention now because I think I've given
15 you a lot to digest. And the one thing I don't want
16 to do is confuse you at this stage. I believe
17 firmly that as the trial goes on, you're going to
18 become very comfortable with knowing who these
19 individuals are and what their roles are. Maybe not
20 the first time through, but day two, day three it's
21 going to start coming together more.

22 So having identified those individuals, I'd
23 like to tell you a little bit about what I think is
24 going to unfold.

25 Mike McQueary was a graduate assistant coach

1 for Penn State's football team from February 2000 to
2 February 2003. These graduate assistant
3 appointments are typically two or three years. One
4 of the requirements is that you be enrolled in
5 graduate school and be working toward a graduate
6 degree while you're serving in this primarily
7 administrative function for the football team.

8 In February of 2001, specifically February 9th
9 of 2001, about nine o'clock or so in the evening,
10 Mike went to the Lasch Football Building support
11 staff locker room. And Mike was support staff. He
12 wasn't head coach, he wasn't assistant coach, he was
13 support staff. And he went for the purpose of
14 depositing some sneakers he had just bought in a
15 locker. And he witnessed something that shocked him
16 to his core.

17 And while he was putting his sneakers in the
18 locker room, he heard some sexual sounds. And he
19 looked and he saw Jerry Sandusky and a boy about 10
20 to 12-years-old in the shower in the support staff
21 locker room engaging in sexual conduct. I'm not
22 going to say any more about it at this time, he will
23 have to testify about it. And he will testify about
24 it. And it shocked him to his core.

25 He went to his parents' house within minutes

1 after having seen this. And I might add, when he
2 saw it, he slammed the locker door to stop the
3 activity. He did stop the activity. He went to his
4 parents' house and did his best to try to convey to
5 his father what he had seen, he was still quite
6 distraught and upset.

7 And joining them at the house was Dr. John
8 Dranov, a long time and trusted family friend. And
9 Dr. Dranov heard part of what Mike was trying to
10 say, and they both advised him, you got to tell Joe,
11 Joe being Joe Paterno. It's now ten o'clock or so
12 at night.

13 7:30 the next morning, Mike called Coach
14 Paterno, said he had to speak to him as soon as
15 possible, he said it was serious. Coach Paterno
16 said come on over. And Mike told coach Paterno in a
17 general way what he had seen. And he will explain
18 to you why he wasn't specific and graphic with Coach
19 Paterno better than I could in an opening statement.
20 And Coach Paterno said I will report this to the
21 proper people.

22 Now, this is the morning of February 10th
23 2011. It appears that Coach Paterno reported what
24 Mike had told him more or less to Tim Curley and
25 Gary Schultz. Again Tim Curley, being Joe Paterno's

1 boss, the athletic department head, and Gary Schultz
2 was Tim Curley's boss as well. Gary Schultz had --
3 he was pretty high up on the chain, pretty broad
4 jurisdiction including, by the way, supervising the
5 Penn State Police Department, supervising the
6 department I mentioned that Tom Harmon was chief of.

7 On Sunday, February 11th, so we're now not two
8 days after Mike's witnessing the incident, Gary
9 Schultz called Wendell Courtney, called his outside
10 counsel, a lawyer, on a Sunday. And Mr. Courtney
11 did what we lawyers do. We make entrance of the
12 work we do, the amount of time we spend. And he
13 made an entry on his time sheet for Sunday, February
14 11th, 2001, conference with G. Schultz Re: Reporting
15 of suspected child abuse, legal research Re: Same,
16 conference with G. Schultz. 2.9 hours. The Re,
17 R-E, is, I don't know where it got started, but it's
18 lawyer's shorthand for concerning. It's not R-A-Y,
19 it's R-E.

20 Mr. Courtney will be testifying. And he will
21 say that when he got back to Gary Schultz on
22 February 11th, 2001, he told Mr. Schultz report
23 this to DPW. Report this to DPW.

24 February 12, 2001, one day, apparently Mr.
25 Schultz called Mr. Harmon, chief of Penn State

1 Police, and this is where we get into the flashback.
2 And the flashback is in 1998, there was an incident
3 report of Jerry Sandusky in questionable conduct
4 with a boy. And the Penn State Police investigated
5 it and built quite an extensive file. And the then
6 district attorney of Centre County Ray Gricar
7 declined to prosecute. That's the flashback part.

8 And on February 12, 2001, Chief Harmon in
9 response to an inquiry from Gary Schultz reported
10 that we still have a file, we still have that file,
11 it's imaged, it's on a computer somewhere or a disk
12 somewhere, or something like that. Still, neither
13 Schultz nor Curley have met directly with Mike
14 McQueary.

15 A week or so later, they met. And Mike, not
16 dealing with the paternal figure or grand paternal
17 figure like Joe Paterno, this is paternal, not
18 Paterno, was more specific and direct about what he
19 had seen. It was quite graphic about what he had
20 seen. And he told him this is serious, we're going
21 to see it's investigated, and we're going to see
22 that appropriate action was taken.

23 And we believe that at the end of the trial
24 there will be sufficient evidence for you to
25 conclude that at that time when they told that to

1 Mike McQueary, they did not intend to do that.
2 Their intention was to sweep this incident under the
3 rug. And I cannot instruct you as to the law,
4 that's Judge Gavin's role, but it's our position
5 that this statement to Mr. McQueary in February of
6 2001 was a misrepresentation, illegal
7 misrepresentation of the law which is titled
8 damages. That's one of the counts in this lawsuit.

9 Now we're going to go ahead to 2011. In 2011,
10 the Pennsylvania Office of Attorney General was
11 completing its investigation of Jerry Sandusky and
12 certain allegations that were made against him, all
13 in the order of sexual molestation.

14 And one of our witnesses today, in fact,
15 she'll be our first witness, Jonelle Eshbach, was
16 the attorney within the Office of Attorney General
17 who was leading that investigation, an investigation
18 which started I believe in the year 2009.

19 Toward the end of 2010, somebody gave the
20 Attorney General's office a tip, you ought to speak
21 to Mike McQueary. And the investigators did. And
22 Mike gave them a statement as to what he had seen
23 and that he had told Tim Curley and Gary Schultz
24 what he had seen back in 2001.

25 Attorney Eshbach will explain to you the grand

1 jury process. The grand jury process involves
2 people coming in and testifying under oath and
3 answer the questions which are put to them by
4 prosecuting investigating attorneys.

5 And Tim Curley and Gary Schultz were summoned
6 to the grand jury and asked questions including
7 questions about what did Mike McQueary tell you.
8 And they denied that he told them specifically and
9 graphically what he had seen back in 2001.

10 On or about October 28, 2011, Cynthia Baldwin,
11 general counsel for Penn State, received a
12 notification, I believe it was in the form of a
13 telephone call, from one of her former colleagues
14 who's still working in the Office of Attorney
15 General to give her a heads up that Mr. Schultz and
16 Mr. Curley were going to be criminally charged for
17 among other things perjury.

18 On October 28th, 2011, Graham Spanier decided
19 that if two of his senior administrators were being
20 charged by the Attorney General, without knowing
21 what the charges were going to be specifically, that
22 he was going to issue a public statement. And he
23 drafted a public statement and he convened a meeting
24 to go over the public statement. At that meeting,
25 Cynthia Baldwin, Penn State's general counsel; Bill

1 Mann, again, the director of University relations I
2 identified earlier; Lisa Powers, another high
3 ranking PR person within the University, and Steve
4 Garban, the chairman of the Board. And we only have
5 two or three drafts of that document.

6 But ultimately, on November 5, 2011, the day
7 after the news of the criminal prosecution of Mr.
8 Curley and Mr. Schultz were announced, the media put
9 up a statement on Penn State's website called Penn
10 State Live, and you're going to see this statement
11 frequently during the course of the trial. I'm not
12 going to read the whole thing to you, you're going
13 to see it up on the screen. But in the final
14 sentence in the really three short paragraphs after
15 he stresses his quote unconditional support for Tim
16 Curley and Gary Schultz, he concluded, "I am
17 confident the record will show that these charges
18 are groundless and that they conducted themselves
19 professionally and appropriately." The charges are
20 groundless. The charges are groundless.

21 President Spanier I believe is going to admit
22 that when he authorized that this statement be put
23 on Penn State Live for the world to see forever on
24 the internet, he did not know what the specific
25 charges were. And they're set forth in a grand jury

1 presentment. And Attorney Eshbach will explain to
2 you what a grand jury presentment is. But he was
3 saying, after input from two high ranking PR folks
4 employed by Penn State and the general counsel and
5 the chair, without knowing what the specific charges
6 were, these charges are groundless.

7 Furthermore, I believe that Cynthia Baldwin
8 will testify that she, too, did not know what the
9 specific charges were when the statement was
10 released on November 5. So, too, will Lisa Powers
11 and Bill Mann will testify that they, too, did not
12 know what the specific charges were. And Steve
13 Garban, Penn State's chair, will also testify that
14 he, too, did not read the presentment or know what
15 it was at the time this statement was published.

16 Now the grand jury presentment, you will be
17 seeing a section of this, specifically states, and
18 I'm going to shorten it up a tad but, "Tim Curley
19 made a materially false statement under oath that he
20 was not told by the graduate assistant that Sandusky
21 was engaged in sexual conduct or anal sex with a boy
22 in the Lasch Building showers." That's the
23 presentment, that Tim Curley made a materially false
24 statement. He's charged with lying to the grand
25 jury.

1 Gary Schultz similarly was charged by the
2 grand jury for making a materially false statement
3 when he said that the allegations the graduate
4 assistant made were quote, not that serious, end
5 quote, and that he and Curley quote, had no
6 indication that a crime had occurred.

7 So, Mr. Schultz and Curley are charged with
8 lying about what Mike McQueary told them. So when
9 the statement from President Spanier says that these
10 charges are groundless, it's, in effect, saying
11 Curley and Schultz aren't lying, Mike McQueary is
12 the one who lied before the grand jury, Mike
13 McQueary is the one who committed perjury. And that
14 forms the basis for the defamation count. That
15 statement that was issued, again, before anybody had
16 read the presentment was issued without any regard
17 for what might be true.

18 Unfortunately, confirming the malice of the
19 University is the way the University treated Mike
20 McQueary after it issued this statement. It was, to
21 be sure, a hectic, frantic week following the public
22 release of the news that Jerry Sandusky was being
23 charged with 48 counts of sexual misbehavior and
24 that two high ranking Penn State administrators were
25 being charged with perjury and failing to report, as

1 they were to report to DPW, this incident.

2 Nevertheless, the football team carried on.
3 Practices were the way they always were. Sunday --
4 and I have to say, that weekend of November 5, 6,
5 Penn State did not have a football game, so the
6 assistant coaches were -- most of them were off on
7 recruiting trips. But they came back, and on Sunday
8 afternoon, they resumed their work routine, film,
9 whatever it is, practices with the athletes Monday,
10 Tuesday, Wednesday. Everything was normal. Mike
11 McQueary did everything that he usually did.

12 Wednesday night, Coach Paterno was fired, as
13 was Graham Spanier. So that's the 9th. Tom Bradley
14 was appointed assistant football coach Wednesday
15 night. There was a game with Nebraska Saturday.
16 Thursday, the next day, as far as Tom Bradley was
17 concerned, Mike McQueary was coaching on Saturday,
18 he's an integral part of the team. Nothing has
19 happened so far that has impacted negatively what
20 football coaches do.

21 However, it's not quite clear exactly who, but
22 the administration decided that Mike McQueary
23 wouldn't be coaching Saturday. And Mark Sherburne,
24 the now acting athletic director, broke that news to
25 Mr. McQueary after practice on Thursday. So, toward

1 the evening. He said, you're not going to be
2 coaching. Second thing, we think you should leave
3 the area for the weekend.

4 So, Mike and his wife, little daughter,
5 Claire, left the area Friday morning as directed.
6 About 1:30 p.m. on Friday, Mike speaks with Mark
7 Sherburne, cell phones, while, I believe he told me
8 he was on the Schuylkill Expressway. And Mark
9 Sherburne says you're going to be placed on paid
10 administrative leave. Four o'clock today, the new
11 president, Rodney Erickson, is going to be holding a
12 press conference announcing that. And when you come
13 back to town, don't forget he'd been told to leave,
14 when you come back, we'll explain what that is.

15 So Mike was back Sunday, the meeting was held
16 around 7:00 p.m. in, I believe it was Mark
17 Sherburne's office. And present at the meeting, in
18 addition to Mr. Sherburne, is Erica Runkle,
19 remember I mentioned she was the PR person attached
20 to the athletic department, and Cynthia Baldwin.
21 And they read to him, I should say Mr. Sherburne
22 read to him, and gave him a copy of what they call
23 The Script.

24 And The Script defines, you know, you're
25 placed on administrative leave. Among other things,

1 the following facilities are off limits, all
2 athletic facilities associated with the Penn State
3 Athletic Department. So not only was Mike placed on
4 administrative leave, but he was not able to go on
5 any athletic facility associated with the football
6 program.

7 In, I think, the beginning, January 1, 2012,
8 all employees who would have had satisfactory work
9 evaluation were to get a small raise. It wasn't a
10 big raise, it was a small raise. Mike McQueary, on
11 his last performance evaluation prior in May was
12 rated significantly exceeds all expectations, the
13 highest rating, did not get a raise.

14 About a week later, new head football coach is
15 hired by Penn State, Bill O'Brien. And as is
16 standard protocol, Mr. O'Brien interviews all the
17 incumbent football coaches to get an idea, to get
18 their knowledge, you know, status of things, what's
19 going on, maybe he'll hire a few. And in fact, he
20 did hire two. But the evidence I think will show
21 that all of the assistant football coaches under Joe
22 Paterno were granted an interview by Bill O'Brien
23 except for one, Mike McQueary.

24 Some time, and I don't know when, but some
25 time in May, June 2012, apparently the University

1 decided it would no longer employ Mike McQueary
2 after June 30, 2012. And Erica Runkle will testify
3 I believe that it's standard protocol that if
4 somebody is going to be severed like that, they 're
5 going to be notified ahead of time. Standard. Mike
6 McQueary wasn't notified about that. Mike McQueary
7 found out he was no longer an employee of Penn State
8 when a question was asked of Rodney Erickson in a
9 press conference in the first week or two in July of
10 2012. That's how he found out he had been severed.

11 In 2008, Mike, along with other assistant
12 coaches, were provided with a severance agreement to
13 give them some job security, because Joe Paterno
14 wasn't getting any younger and everybody was
15 speculating how long Joe was going to coach. And it
16 makes sense, in order to keep your assistants to say
17 look, he's no longer coaching, we're going to give
18 you a severance package after 18 months. So Mike
19 had that.

20 So when he's not severed -- I'm sorry, when he
21 is severed beginning July 1, 2012, he doesn't get
22 his severance. All the other assistant football
23 coaches, who by the way were notified in January by
24 Bill O'Brien who weren't retained, they got their
25 severance packages immediately, which includes

1 health insurance. I should say Bill O'Brien
2 retained two assistants, one which is Rod
3 Vanderlinden and Johnson -- Larry Johnson.

4 But Mike McQueary doesn't get his severance,
5 which forces him in August of 2012 after he's
6 received notice that your health insurance has been
7 terminated and Penn State is not saying they're
8 going to honor the severance agreement, he had to
9 cash out his 401K. I don't know if anybody here has
10 ever done that, but it will explained to you by an
11 economic expert that when you cash out your 401K
12 before you're age 59 and a half, a problem I don't
13 have, you pay penalty in addition to regular income
14 tax, you pay 10 percent above that. So because Penn
15 State would not agree to timely honor his severance
16 agreement, he was forced to cash out his 401K.

17 All of these efforts by Penn State to treat
18 Mike differently confirmed the malice of the
19 University toward him. Why? If there's no Mike
20 McQueary, if Mike McQueary folds, if Mike McQueary
21 collapses, then the charges against Curley and
22 Schultz disappear. So while Mike has just been
23 accredited as being an important part of the
24 Sandusky prosecution, if he is ostracized, if he is
25 marginalized, if he can't make it, then Curley and

1 Schultz's efforts to succeed in their criminal cases
2 improve.

3 Mike was placed on administrative leave,
4 effective November 11, 2011. Between that time and
5 now, he has been able to earn less than \$10,000
6 total.

7 The Judge talked about testimony that you're
8 going to hear, you're also going to have before you
9 documentary exhibits. I don't want to scare you,
10 these are plaintiff's documentary exhibits, much of
11 them are going to be introduced into evidence. This
12 Plaintiff's Exhibit 79 are records of Mike's efforts
13 to look for employment since he was severed. And
14 not just employment in the football area, but
15 employment in non-football jobs.

16 And towards the end of Plaintiff's case, we
17 will be presenting two expert witnesses. One, an
18 athletic director of longstanding will explain how
19 athletic directors and head coaches looking at how
20 Penn State has treated Mike McQueary. If they're
21 treating him this way, he must have done something
22 wrong. You don't put somebody on administrative
23 leave unless they've done something wrong. And this
24 is a cloud that hangs over his head through today.

25 Some of these job efforts are almost

1 heartbreaking. He accepted a job that would have
2 paid him \$5,000 for a season just to try to get back
3 into coaching. And then the administration at that
4 school told the coach to rescind the offer.

5 As our expert will say, administrations don't
6 want to take a chance. Penn State, a big
7 prestigious, university takes action like that.
8 What if he did something wrong?

9 Interestingly enough, on November 13, 2011,
10 when Mike was placed on administrative leave, after
11 he was read The Script, he said, "I just want to
12 state that I want to continue to coach at Penn State
13 and I don't think I've done anything wrong." And
14 Cynthia Baldwin, general counsel for the University
15 said, "No one is saying that you did."

16 We will also present an accountant, financial
17 analyst, who will explain to you the impact that
18 this treatment has had on Mike McQueary's ability to
19 earn a living up until now and in the future in his
20 profession of coaching.

21 So, that's what I think is going to unfold.
22 Not all on day one, not all on day two, as Judge
23 Gavin said, by the time we get to the end of the
24 trial, that's what I think is going to happen.

25 Now there's one other thing I want to mention

1 as I close, and that is, the University will likely
2 argue that Graham Spanier has said that he didn't
3 know that the grad assistant who testified what he
4 witnessed and that he told Curley and Schultz, he
5 did not know that the grad assistant was Mike
6 McQueary. I believe at the conclusion of the trial
7 there's going to be substantial evidence that you
8 will conclude that that's probably not true.

9 But the other two things I want to mention are
10 number one, Cynthia Baldwin, general counsel to Penn
11 State, because she was in the grand jury room with
12 Mr. Schultz and Mr. Curley and she heard the
13 specific questions that were put to them, did Mike
14 McQueary tell you this? Did Mike McQueary tell you
15 that? So she knew.

16 And the third thing I want to tell you is that
17 Mike, and I think, I've never been a judge I can't
18 say for sure, you might be instructed when the Judge
19 gives you his final instructions, that it doesn't
20 matter if he knew or didn't know that it was Mike
21 McQueary.

22 So I thank you for your attention, I've given
23 you an awful lot to digest. But I do believe when
24 we get into the trial after a couple days, these
25 names are going to make sense to you.

1 THE COURT: Okay.

2 MS. CONRAD: Good morning. Thank you for
3 your service as a juror and your willingness to
4 listen, listen carefully and focus on the evidence
5 in this case.

6 My name is Nancy Conrad and along with my
7 colleagues George Morrison, and Kim Havear, we
8 represent The Pennsylvania State University.

9 You will learn during the course of this trial
10 that Penn State is a public land grant, research
11 intensive university with campuses across the state
12 of Pennsylvania. Founded in 1855, the University
13 has a threefold mission, teaching, research, and
14 public service. The University has 24 campuses,
15 approximately 17,000 faculty and staff, and it
16 serves over 100,000 students.

17 With us today is Allison Newhart from the
18 University. And during the course of this
19 proceeding, you will meet many faces and people of
20 Penn State, including former president, Rod
21 Erickson, Dr. Spanier, and members of the Penn State
22 community from various offices, departments
23 including athletics, many of whom are Mr.
24 McQueary's closest friends.

25 The University requests that you, as the Judge

1 instructed, keep an open mind and hear all of the
2 testimony, consider all of the evidence as you
3 consider the claims and defenses in this case.

4 Now, what's important to recognize is that
5 this is not a case about Jerry Sandusky. Jerry
6 Sandusky was tried and convicted. This is not a
7 case about Tim Curley and Gary Schultz. You heard
8 Mr. Strokoff said they've been charged but they have
9 not yet had their day in court. They've not been,
10 and may not be convicted.

11 This is a case about Mr. McQueary and his
12 employment at the Pennsylvania State University. He
13 asserts three claims. First, Mr. McQueary asserts a
14 claim under the Pennsylvania Whistleblower Statute.
15 He claims that the University terminated his
16 employment because he cooperated with the Office of
17 Attorney General and provided testimony to the grand
18 jury and in various proceedings.

19 He further claims that a statement by Dr.
20 Spanier is defamatory and this one statement caused
21 harm to his reputation for honesty and integrity,
22 and it has impaired his ability to get a job.

23 He then claims that his reliance on certain
24 representations from Mr. Curley and Mr. Schultz
25 branded him as being part of a cover up, which

1 caused him irreparable harm in his ability to earn a
2 living in his chosen profession of football.

3 Let's break that down. With respect to Mr.
4 McQueary's whistleblower claim, the evidence will
5 establish that in November 2011, the University
6 placed Mr. McQueary on leave. I don't know if you
7 heard that from Mr. Strokoff, but the University
8 placed him on paid administrative leave. And the
9 reason the University placed him on paid
10 administrative leave was for concern for his safety
11 and the safety of others.

12 In June 2012, the evidence will show that the
13 University did not terminate his employment. It did
14 not terminate his employment because of his
15 cooperation with the Office of Attorney General, but
16 rather, his employment contract expired. And while
17 Mr. McQueary was employed, the evidence will show
18 that the University complied with the terms and
19 conditions of that employment contract not just
20 during his employment, but even after his
21 employment.

22 Now with respect to his defamation claim, the
23 evidence will show that Dr. Spanier's statement did
24 not cause any harm to Mr. McQueary. It did not
25 injure his representation for honesty and integrity,

1 nor did it impair his ability to get a job. Dr.
2 Spanier's statements does not name Mr. McQueary,
3 does not reference Mr. McQueary. And Dr. Spanier
4 will testify that he did not intend for it to apply
5 to Mr. McQueary. Most important, there is no
6 evidence that will establish that Mr. McQueary
7 suffered harm as a result of that statement.

8 Now, with respect to the misrepresentation
9 claim, you will not hear from Mr. Schultz or from
10 Mr. Curley during this trial. And the University
11 will not hide behind the fact that both individuals
12 are facing criminal charges. As I noted, Mr.
13 Curley and Mr. Schultz have not yet been tried on
14 those charges. They haven't had their day in court.
15 They -- and they have not been convicted on any of
16 these crimes.

17 In this case, the evidence will be
18 insufficient to establish any misrepresentation by
19 Mr. Curley and Mr. Schultz, and there will not be
20 evidence as to their intent in their communications
21 with Mr. McQueary. Any alleged harm to Mr. McQueary
22 was not caused by statements that were made in 2001.

23 Finally, with respect to his claim for
24 damages, the evidence will show that any harm that
25 Mr. McQueary suffered was a result of his own

1 decisions and actions. Conduct that was reported by
2 national media, bloggers, even former governor of
3 Pennsylvania. These reports, these articles, this
4 information center on Mr. McQueary's decision to
5 leave a young boy in the shower with Jerry Sandusky.
6 The evidence will show that. And as Mr. McQueary
7 himself has acknowledged, "National media and public
8 opinion has totally in every way ruined me.

9 With respect to the evidence, starting on
10 November 4th, 2011 -- we need turn it on. With
11 respect to the evidence, on November 4th, 2011, the
12 University was thrown into a center of a major
13 controversy with the release of the grand jury
14 presentment.

15 The grand jury presentment provided
16 information about what had occurred in 2001. As
17 Attorney Strokoff had related to you, in 2001, a
18 graduate assistant, an unnamed graduate assistant,
19 went into the building and -- at Lasch, and observed
20 Jerry Sandusky in the shower naked with a young boy.

21 It wasn't until nine years later, in December
22 2010, that investigators from the OAG contacted
23 Michael McQueary. And note, Michael McQueary didn't
24 reach out to law enforcement or to the Office of
25 Attorney General. The evidence will show that it

1 was the investigators who contacted Mr. McQueary to
2 find out what information, if any, he had about
3 Jerry Sandusky.

4 As a result of the information that the
5 investigators obtained, a grand jury was convened.
6 Information was heard from Mr. McQueary as well as
7 many other witnesses. And on November 5th, 2011,
8 the grand jury presentment was officially released.
9 Mr. Sandusky was charged with numerous counts
10 relating to the sexual abuse of minors. And two
11 University officials, Tim Curley and Gary Schultz,
12 were each charged with one count of failure to
13 report and one count of perjury.

14 Imagine in State College at this time, a media
15 storm followed. News outlets swarmed on campus, in
16 the community. Messages and emails flooded the
17 University, messages such as, "Former Coach at Penn
18 State is Charged with Abuse," "Ex-Penn State Coach
19 Sandusky Arrested on Sex Charges."

20 And it was about the same time that Dr.
21 Spanier issued a statement. The statement, as shown
22 to you on the screen, provides the following. "The
23 allegations about a former coach are troubling, and
24 it is appropriate that they be investigated
25 thoroughly. Protecting children requires the utmost

1 vigilance. With regard to the other presentments, I
2 wish to say that Tim Curley and Gary Schultz have my
3 unconditional support. I have known and worked
4 daily with Tim and Gary for more than 16 years. I
5 have complete confidence in how they have handled
6 the allegations about a former University employee.
7 Tim Curley and Gary Schultz operate at the highest
8 levels of honesty, integrity, and compassion. I am
9 confident the record will show that these charges
10 are groundless and that they conducted themselves
11 professionally and appropriately.

12 Look at the statement. Nowhere does it name
13 Michael McQueary. Nowhere does it reference Mr.
14 McQueary. And Dr. Spanier will testify in this
15 proceeding that he had no intent to refer to Mr.
16 McQueary.

17 The evidence will also show that after Dr.
18 Spanier made similar remarks to meetings to the
19 football staff and the intercollegiate athletics,
20 members who attended that meeting who heard the
21 statement walked out and not one of them thought
22 that the statement had any reference to Mr.
23 McQueary. Yet, Mr. McQueary claims that this
24 statement is defamatory, that it has ruined his
25 representation and that it prevents him from

1 obtaining a position in the field of football. As
2 you will see, the evidence will not support that
3 claim.

4 Now, as that week in November unfolded, the
5 identity of the unnamed graduate assistant in the
6 presentment was reported. Not by the University, it
7 was reported by the media. The graduate assistant
8 was Michael McQueary. It was Michael McQueary that
9 had observed and witnessed Jerry Sandusky in the
10 shower with a young boy. And at that point, the
11 media storm grew. And the evidence will show that
12 the communications and messages that flooded the
13 University fixated on Mr. McQueary's conduct.

14 Mr. McQueary has become the target of
15 widespread criticism for not having acted more
16 divisively nine years ago. McQueary has been under
17 fire for not doing anything to stop the alleged rape
18 and then going to Joe Paterno instead of going to
19 the police. McQueary walked in on that horrible
20 scene in the showers and right there it could have
21 stopped. He was a 28-year-old of good health and
22 strong build, and he walked away. McQueary failed
23 to act like a responsible human.

24 Amidst this chaos, this flood of
25 communications, the University, while continuing its

1 education operations, made a critical and
2 significant series of decisions. On November 9,
3 2011, a president was removed from his office. A
4 legendary football coach was removed from his
5 position. And the University continued to be
6 flooded with communications.

7 The crisis mounted. There were demonstrations
8 and riots on campus. The media presence was
9 everywhere. The communications that the University
10 was receiving followed a pattern. Initially, they
11 contained outrage directed at the terrible and
12 tragic acts of Jerry Sandusky. Shock about the
13 charges against Tim Curley and Gary Schultz.
14 Disbelief about the removal of Coach Joe Paterno.

15 And you will hear from University witnesses
16 that a profound sadness, a profound sadness and
17 concern was at the center of the University, a
18 concern that related to the children. The
19 University community and administration at that
20 point in time recognized that a priority must be the
21 protection of children. And at the same time, the
22 University had to deal with what was happening on
23 campus including a rising safety factor that related
24 to Mike McQueary.

25 As you heard, by Thursday, November 10th, Tom

1 Bradley had been appointed interim head coach. And
2 at a press conference that morning, Coach Bradley
3 was asked, "What about Mike McQueary?" And Coach
4 Bradley said, "Yes, Mike McQueary will be coaching
5 on Saturday night, and that will be a game day
6 decision about whether Mr. McQueary is on the field
7 or up in the press box."

8 Coach Bradley, in that press conference, was
9 also asked about the intense national scrutiny
10 centered on Mike McQueary. And he was asked whether
11 it was appropriate for McQueary to coach that game.
12 Coach Bradley responded in that press conference,
13 "It's a decision that's up to administration."

14 Now at this time, and due to the national
15 coverage, the University now is receiving increased
16 communications about Mike McQueary. The president's
17 office, the athletics department, the office of
18 public information, and Mr. McQueary himself were
19 receiving vile, vicious, threatening communications
20 that included death threats.

21 The evidence will show that Mr. McQueary
22 forwarded some of these vile, vicious, death threats
23 to the Office of Attorney General. He forwarded
24 articles that had been published about him. He said
25 to the Office of Attorney General, "They say he's

1 worse than Sandusky." "Words can't begin to
2 describe the intensity of rage one writer wrote that
3 I feel for you, and I will do everything I can to
4 get you fired and never work even in a McDonald's
5 again, let alone football. Your name has been
6 smeared forever. And another message to Mr.
7 McQueary, and excuse me language, stating, I want to
8 kill you you effing piece of S-H-I-T.

9 Mr. McQueary also sought guidance from a
10 trusted friend and colleague at the University. And
11 he asked him whether he should follow the advice of
12 law enforcement and leave town for the weekend. The
13 new interim president at the University, Dr.
14 Erickson, as he considered these messages, weighed
15 how to address this situation. He made the
16 decision -- and you will hear Dr. Erickson during
17 these proceedings. He will tell you that he made
18 the decision that due to safety factors, Mike
19 McQueary could not coach in that Saturday Nebraska
20 game.

21 Dr. Erickson in response to questions from the
22 press said it became clear that Mike McQueary could
23 not function in his role under these circumstances.
24 The evening of November 10, 2011 Penn State
25 Athletics posted a press statement, "Due to the

1 multiple threats made against Coach McQueary, the
2 University has decided it would be in the best
3 interest of all that Assistant Coach Mike McQueary
4 not be in attendance at Saturday's Nebraska game."

5 And Dr. Erickson further explained that he
6 made the decision to place Mike McQueary on
7 administrative leave. And I'm not sure if Attorney
8 Strokoff said this, but Dr. Erickson placed Mr.
9 McQueary on paid administrative leave. During the
10 time he was on leave, Mr. McQueary received his full
11 salary and all benefits for the duration of his
12 contract.

13 Now, during the months that followed this
14 chaos, the University continued to focus on its
15 commitment to the welfare and safety of children.
16 Dr. Erickson will testify that in December of 2011,
17 he reiterated the University's concern for the
18 victims of child abuse and he announced that the
19 University was establishing the Center for the
20 Protection of Children in partnership with the
21 Pennsylvania Coalition Against Rape and the national
22 Sexual Violation Resource Center.

23 Now it was also during this time and while Mr.
24 McQueary was on paid administrative leave that the
25 University began the search for a new head football

1 coach. As you will hear from Mr. McQueary's
2 coworkers, his friends, other coaches, and our
3 expert, everyone knows when a new head football
4 coach is named, that every assistant coach should
5 realize that they're going to be facing a pink slip.

6 The evidence will show that when Coach O'Brien
7 came to Penn State for his interview, not even being
8 hired yet, he had a list. And that list contained
9 the names of the assistant coaches that he wanted to
10 bring with him to Penn State, some who had already
11 committed to join him. One of those coaches was
12 wide receivers coach Stan Hixon. Mr. McQueary had
13 previously been the wide receivers coach under Coach
14 Paterno.

15 Now, Coach O'Brien wanted Stan Hixon because
16 he had coached with him at Georgia tech. He knew
17 Stan Hixon. And Stan Hixon had coached at a number
18 of colleges and universities in addition to coaching
19 for the Washington Redskins and the Buffalo Bills.
20 And then when he was appointed in January of 2012,
21 Coach O'Brien announced his list of assistant
22 coaches that included wide receivers coach Stan
23 Hixon.

24 And yes, he did retain two Penn State
25 assistant coaches, Larry Johnson and Ron

1 Vanderlinden. But the evidence will establish that
2 these coaches, that is Johnson and Vanderlinden,
3 along with the assistant coaches that Coach O'Brien
4 selected, have national reputation. And with
5 respect to Coach Johnson and Vanderlinden, the
6 evidence will show that the players, the members of
7 the team, had met with one of the administrators and
8 had specifically said when a new head coach is
9 hired, please see if Vanderlinden and Johnson can be
10 retained.

11 Now, Mr. McQueary has asserted the position,
12 and you head Attorney Strokoff say that he was
13 denied the opportunity to have a courtesy meeting
14 with Coach O'Brien like some of the other assistant
15 coaches. Evidence will show that not all of the
16 assistant coaches had courtesy meetings with Coach
17 O'Brien, and that there will simply be no evidence
18 to establish that Mr. McQueary would have ever been
19 hired by Coach O'Brien.

20 On March 8, 2012, while Mr. McQueary is still
21 on paid administrative leave, he files his lawsuit
22 against the University. And then on June 30, 2012
23 Mr. McQueary's contract, his appointment comes to an
24 end. His contract expired. And Dr. Joyner, in
25 consultation with the president, determine that

1 there is not going to be a new contract for Mr.
2 McQueary because there's not a place for him on Bill
3 O'Brien's staff.

4 But significantly, and I didn't hear this
5 earlier, when Mike McQueary's contract ended, when
6 he stopped receiving his salary on paid
7 administrative leave, the payments didn't stop. The
8 evidence will show that Mr. McQueary, like most of
9 the other assistant coaches under Coach Paterno, did
10 have these letter agreements and they provided for
11 severance payments provided that one, they were
12 employed as an assistant coach at the time of Coach
13 Paterno's departure as head coach; and two, their
14 employment ended as a consequence of a decision by a
15 new head coach. You will hear Dr. Erickson testify
16 that while they were some issues that the University
17 was looking at as to whether or not that severance
18 applied, Dr. Erickson made the decision that it was
19 the right thing to do. And he directed that
20 severance payments be made to Mr. McQueary. That
21 means that after his paid administrative leave, he
22 then received 18 months of full salary and benefits,
23 salary that amounts over \$200,000, salary that was
24 received at a time that he was no longer employed by
25 the University. But that's not enough.

1 Mr. McQueary asserts in this action that he's
2 entitled to receive lifetime earnings. In the
3 complaint that he filed with this Court, he seeks
4 over \$4 million. And that's because he claims his
5 reputation is ruined and he cannot find a job. But
6 the evidence will show that this claim fails.

7 You will hear from friends and coworkers as
8 well as our experts that the reason McQueary cannot
9 get a job is not because of something the University
10 did, it's not because of an action by the
11 University. The evidence will show that Mr.
12 McQueary failed to develop a network. And the
13 number one factor that is essential in obtaining a
14 new position in the field of coaching, Mr. McQueary
15 had coached at one school, under one head coach, and
16 with mostly the same staff of assistant coaches
17 during his coaching career.

18 You'll meet the head coach of Temple
19 University, Matt Rhule. And Coach Rhule will
20 testify that in his opinion, Mr. McQueary did not
21 have the range of experience or the depth of
22 experience. Coach Rhule will testify that when he
23 was named head coach at Temple in 2012, Mr. McQueary
24 was not even in the running for a position on his
25 staff, even though Mr. McQueary considered Matt

1 Rhule one of his closest friends.

2 The evidence will show that Mr. McQueary did
3 not develop a national reputation to land a job in
4 the field of football, that Mr. McQueary wants you
5 to hold Penn State responsible for his failures.
6 The testimony, the evidence will not support such a
7 claim.

8 The evidence will establish that any harm Mr.
9 McQueary alleges, including any injury to his
10 reputation or his failure to obtain a job is not the
11 result of the actions of Penn State. The evidence
12 will show that Mr. McQueary's alleged harms are the
13 result of his own failure to act, and he should not
14 be permitted to exploit the tragedy that was caused
15 by Jerry Sandusky for his own personal financial
16 game. Thank you for listening.

17 THE COURT: Members of the jury, this is how
18 much evidence you still have. Zero. Nothing.
19 You've heard what the attorneys say they're going to
20 attempt to establish. I'm going to give you just a
21 brief overview of the law.

22 Simply put, on the whistleblower, Mr. McQueary
23 says that because he testified against Mr. Sandusky
24 that he was terminated by the University for having
25 done so. The University says not so, he was let go

1 because the new coach didn't want him and the
2 contract expired. That's the issue there.

3 With regard to the defamation count, the
4 University admits that they sent that publication
5 out. So, a communication is defamatory if any
6 portion of it tends to so harm the reputation of
7 that person as to lower him in the estimation of the
8 community or to deter third persons from associating
9 or dealing with him. A communication that states or
10 implies that a person has acted in a way that would
11 be inconsistent with the proper, honest, and lawful
12 performance of his job, profession, or office or has
13 a character that would make him unfit to properly,
14 honestly, and unlawfully perform his job, profession
15 or office is defamatory.

16 In deciding whether the communication was
17 defamatory, you should consider the message, the
18 communication would send to the average person who
19 could have been expected to receive it. That is
20 everybody who was on that network Live or accesses
21 it. That means you should consider the innuendos
22 and implications of what was said as well as
23 inferences the recipients would have drawn from what
24 may not have been said. You should also consider
25 the context in which the allegedly defamatory

1 statement was made.

2 It is not necessary for the plaintiff to be
3 specifically identified by name or official position
4 for the communication to defame him. The plaintiff
5 may be defamed if the defendant intended the
6 communication to refer to the plaintiff or if a
7 description were referenced tends to identify him.
8 The plaintiff may also be defamed where a recipient
9 of the communication is familiar with the
10 circumstances mentioned in the communication and
11 recognizes that it concerns the plaintiff.

12 The burden is on the plaintiff to show that
13 the description or reference in the communication or
14 familiarity with the circumstances would lead the
15 recipients of the communication to reasonably
16 understand it as referring to him.

17 With regard to the misrepresentation claim,
18 the issue is whether a representation was made to
19 Mr. McQueary material to the issue at hand, the
20 reporting, whether it was made falsely with the
21 knowledge of its falsity or recklessness as to
22 whether it was true. In other words, we're going to
23 take some action on this with the intent of
24 misleading Mr. McQueary into relying upon it, and
25 that Mr. McQueary relied upon it. Again, of course,

1 he has the burden, as with everything, to establish
2 the damages.

3 So they're the framework that you're looking
4 for. What is the exact context in which Mr.
5 McQueary was terminated and why? What are the
6 reasons with regard to the defamation, with regard
7 to that article? The people who published it, what
8 would they anticipate that others would know or
9 understand it to mean? And with regard to the
10 misrepresentation, whether or not there was a
11 representation to Mr. McQueary as to what the
12 University was going to do.

13 With regard to the University, the acts of its
14 agents are the acts of the University. So all of
15 these people that you've heard mentioned as
16 University employees, they are the agents of the
17 University. Obviously, the University is a
18 corporate entity and it acts through its agents. It
19 is responsible for the acts of the agent, whatever
20 acts you find they engaged in within the normal
21 scope of their duties. So if someone is in a
22 position where they would have authority in a
23 particular area and they act, that is an act of the
24 University. So that's the legal background.

25 Now, one of the things I forgot to mention

1 was, if any of you need a break outside the normal
2 break we take, just get a hand up and we'll
3 accommodate you on your breaks.

4 The second thing is, there's going to be a
5 quiz when you come back. And the quiz is that you
6 get to seat yourself in the correct order without
7 any assistance. Okay? Having said that, I think
8 we'll take our mid-morning break and let's come back
9 at 20 minutes after the hour. Go ahead and step
10 out.

11 (Whereupon, a recess was taken.)

12 THE COURT: I think it would be helpful,
13 members of the jury, notwithstanding how we have
14 everything collected together there, if you just put
15 your name on top of the first page. And then if for
16 some reason, things get mixed up, we know who's who.

17 Again, I want to remind you with regard to
18 note taking, it's an aid. It probably would be
19 helpful to put somebody's name down, what position
20 they held, what timeframe they're talking about, and
21 then the extent to which you take notes beyond that
22 is up to your own style. Keeping in mind, again,
23 the persons who don't take notes are at no
24 disadvantage when you're discussing a particular
25 witness's testimony with the person who didn't take

1 notes.

2 So now we are beginning to put something on
3 the clean sheet of paper and determine what, in
4 fact, are the true facts in this case. Go ahead,
5 Counsel. Council.

6 MR. STROKOFF: Jonelle Eshbach, Your Honor.

7 JONELLE HARTER ESHBACH

8 Was called as a witness and having been duly sworn,
9 was examined and testified as follows:

10 THE COURT: Thank you, ma'am. Have a seat.
11 Adjust the microphone to suit yourself.

12 DIRECT EXAMINATION

13 BY MR. STROKOFF:

14 Q. Could you please state for the record your
15 name?

16 A. Jonelle Harter Eshbach.

17 Q. And your profession, Ms. Eshbach?

18 A. I'm an attorney.

19 Q. And could you give us your educational
20 background, please?

21 A. I graduated from Penn State in 1984. I
22 graduated from the Dickinson School of Law in 1987.

23 Q. And following your graduation from the
24 Dickinson School of Law --

25 A. I clerked --

1 Q. -- what did you do then?

2 A. I clerked for one year in York County,
3 Pennsylvania.

4 THE COURT: Would you spell your name for the
5 record, please?

6 THE WITNESS: It's J-O-N-E-L-L-E, H-A-R-T-E-R
7 E-S-H-B-A-C-H.

8 THE COURT: Thank you.

9 BY MR. STROKOFF:

10 Q. So, following graduation, you started to say?

11 A. I clerked for Judge Casamatas in York County
12 for one year. And then I joined the district
13 attorney's office in York County where I worked for
14 12 years prosecuting cases up to the position of
15 being the first deputy of York County. Then I left
16 York County and went to the Attorney General's
17 Office, first in their capital litigation unit, and
18 then in the second half of my time at the Attorney
19 General's Office, which was about 12 years, a little
20 more than 12 years, I did trial work.

21 Q. Okay. And when you said Attorney General's
22 Office, could you specifically identify which state?

23 A. The Commonwealth of Pennsylvania Office of
24 Attorney General.

25 Q. Thank you. And during the course of your

1 experience as a York County deputy district attorney
2 and then a deputy attorney general, did you have any
3 experience prosecuting sex crimes?

4 A. Numerous sex crimes. Both against children
5 and against adults.

6 Q. Okay. Specifically, with respect to your
7 time at the Attorney General's Office, did there
8 come a period of time when you received an
9 assignment with respect to an investigation into a
10 Jerry Sandusky?

11 A. Yes. The case was assigned to me.

12 Q. And do you remember about when that was?

13 A. The best of my recollection, I received the
14 case for prosecution in March of 2009.

15 Q. And when you say you received the case, what
16 does that mean?

17 A. The case itself initiated in Centre County.
18 The Centre County District Attorney's Office had the
19 initial information, although it did involve a child
20 from another county initially. The case was
21 referred by the District Attorney of Centre County
22 who was then Mike Madeira to the Attorney General's
23 Office because Mr. Madeira had a conflict of
24 interest and could not handle the case within his
25 office. So the case was sent to the Attorney

1 General's Office. My boss accepted the case and it
2 was assigned to me.

3 Q. And when you say it was assigned to you, what
4 does that mean?

5 A. That means that the people above me
6 determined that I would be the best -- in the best
7 position at that particular time, given the office's
8 resources, to do the investigation and prosecute the
9 case.

10 Q. And with respect to the investigation, did
11 you have any investigators?

12 A. Yes. We were working with both the state
13 police as well as special assistant -- Special Agent
14 Anthony Sassano was initially assigned to the case.

15 Q. And at the time you received this assignment
16 in March of 2009, who was the attorney general?

17 A. Tom Corbett.

18 Q. Okay. Did there come a point in time during
19 this investigation when you came into contact with
20 Mike McQueary?

21 A. Yes.

22 Q. And about when was that?

23 A. To the best of my recollection, and you might
24 have to refresh me on the year because this
25 stretched over a course of years, he came to our

1 attention, I believe it was in December of 2010.

2 Q. Okay. And when you say he came to our
3 attention --

4 A. We had been investigating.

5 Q. Okay.

6 A. And we received a tip that Mike McQueary
7 might have information that would be useful to us in
8 the investigation.

9 Q. Okay. Up until that point, how was the
10 investigation progressing?

11 A. We had, at that time, just the one victim who
12 was a young man from Clinton County. He had been in
13 front of the grand jury. We had -- through the
14 investigators, other young men had been interviewed,
15 they were, at that point, not willing to say that
16 they had been victimized. They would hang their
17 heads, they wouldn't make eye contact with us. We
18 believed they were probably not being truthful with
19 us, but we couldn't force them, couldn't compel them
20 to talk. So at that point in time, we only had one
21 victim. And the case was kind of not moving forward
22 as fast as I would have liked.

23 Q. Okay. But then Mr. McQueary came to your
24 attention?

25 A. At that time we were working on two fronts.

1 We were establishing that there was a 1998 incident
2 that we had had not been aware of. And at the same
3 time, we got -- or around the same time, we got a
4 tip that we should speak to Mr. McQueary. And so, I
5 sent the investigators, post haste to talk to Mr.
6 McQueary.

7 Q. And how did that impact your investigation?

8 A. It was huge. It was extremely helpful to us
9 Mr. McQueary told us what he had seen, that he had
10 seen Jerry Sandusky, what he believed, engaging in a
11 sex act with a boy in the shower in the Lasch
12 Building in the early 2000's. It's highly unusual
13 in these kind of cases to get a disinterested adult
14 witnesses. Oftentimes, in a case like this you
15 might get a stepmother or a mother, family member,
16 but sometimes it's someone with an ax to grind, Mr.
17 McQueary was completely a disinterested person in
18 this, and he had a very strong recollection of what
19 he'd seen. So it was very helpful to us.

20 Q. And in terms of the investigation, what
21 difference did it make --

22 A. Oh, it jump started. I don't want to say
23 that the investigation wasn't going anywhere, but it
24 kicked into high gear with the arrival of Mike
25 McQueary on the scene.

1 Q. Okay. Now, you had said, I believe, that the
2 one victim had been before the grand jury?

3 A. Yes.

4 Q. So that was before Mr. McQueary came on the
5 scene?

6 A. Yes.

7 Q. Okay. Can you explain briefly to the jury
8 how grand juries operate?

9 A. The Attorney General's Office grand jury was
10 a statewide investigating grand jury. It didn't
11 only investigate the case involving Mr. Sandusky, it
12 investigated multiple other cases simultaneously.
13 Jurors would be drawn from the Administrative Office
14 of the Pennsylvania Courts, which runs the whole
15 court system in PA, would determine which counties
16 jurors would be pulled from. We would go and select
17 jurors, the AG's office, with a judge who was
18 appointed to govern it, would select jurors, and
19 then they would meet in a preappointed location once
20 a month for a week at a time and hear cases. They
21 could -- the grand jury could then issue subpoenas
22 and call more different witnesses, collect evidence,
23 documents anything that would help them in
24 determining whether or not they should recommend
25 charges. And that's what happened with this case as

1 well. We were investigating it in front of the
2 grand jury and then we would -- ultimately, there
3 would be a presentment, a document called a
4 presentment which has been referred to here, which
5 details what the grand jury finds and then makes a
6 recommendation and asks the prosecutor to move
7 forward with the case.

8 Q. Okay. Now, you indicated that you went to
9 Penn State between 1980 and 1984?

10 A. I did.

11 Q. Did you have any feelings about receiving
12 this assignment?

13 A. It was -- when I got this file, it was the
14 worst night I could remember. I didn't sleep all
15 night long, I was so concerned. I knew -- I loved
16 the University, I loved the football program. I was
17 in the Blue Band for four years, my parents had
18 season tickets for a couple of decades, so it was
19 not -- and I also knew very well what The Second
20 Mile was, the charity started by Mr. Sandusky for
21 young men. So, it was very difficult for me.

22 Q. Well, when you were at Penn State, were you
23 aware of Jerry Sandusky?

24 A. Oh, yes.

25 Q. And how were you aware?

1 A. Well, he was famous. I mean, he was the man
2 behind the Linebacker U. He -- the first national
3 championship of the Penn State football team
4 happened while I was a student and in the Blue Band,
5 so I was there. And Mr. Sandusky was the defensive
6 coordinator. Everybody knew who he was.

7 Q. And Linebacker U refers to what?

8 A. Penn State was famous for winning its games
9 on the back of its defense. The linebackers are
10 essentially the quarterbacks of the defense. And
11 Mr. Sandusky was famous for his linebacker corp.

12 Q. Okay. Now, when a witness goes before the
13 grand jury, are there any kinds of rules of secrecy?

14 A. Yes. The jury -- the grand jury itself
15 operates in complete secrecy, all the jurors are
16 sworn to secrecy, everyone who appears in front of
17 them is sworn to secrecy, that is myself, the
18 investigators. However, the witnesses themselves,
19 while they are required to tell the truth, they're
20 given an oath to tell the truth, they are not
21 prevented from talking about their testimony after
22 they've testified if they wish to. Some do, many
23 don't. Sometimes grand juries are used to
24 investigate things like organized crime and people
25 might have a reason, a real good reason why they

1 don't want someone to know they've been in the grand
2 jury. So it's really up to the individual and the
3 judge -- the judge in this case, Judge Feudale,
4 instructed the witnesses that they had the right to
5 discuss their testimony with anyone they wanted to
6 after they'd testified.

7 Q. Now, did you happen to witness this
8 instruction by Judge Feudale to Mr. Curley and Mr.
9 Schultz?

10 A. I did.

11 Q. So you personally witnessed them being told
12 by Judge Feudale that they could discuss their grand
13 jury testimony if they wished?

14 A. Yes, I did.

15 Q. Okay. Were you present when they testified?

16 A. I was.

17 Q. Did you ask questions when they testified?

18 A. Yes, I did.

19 Q. Okay. Were you present when Mr. McQueary
20 testified before the grand jury?

21 A. I certainly was.

22 Q. Did you assess his testimony?

23 A. Mike McQueary was one of the best, if not the
24 best, civilian, and by that I mean non-law
25 enforcement witness I ever had. He was rock solid

1 in his testimony as to what he had seen. He was
2 very articulate. His memory was excellent. I was
3 delighted to have him as a part of my case.

4 Q. Could you identify the two lead investigators
5 that you utilized when you were leading this
6 investigation?

7 A. Anthony Sassano for the Attorney General's
8 Office and Trooper Scott Rossman, who later became a
9 corporal. Scott Rossman Pennsylvania State Police.

10 Q. During the course of your investigation, did
11 you ever reach a conclusion about whether or not
12 Mike McQueary had broken any laws with respect to
13 what he had witnessed?

14 A. We didn't believe -- I concluded, and I don't
15 think anyone else concluded otherwise, that Mr.
16 McQueary had done everything he needed to do, that
17 he had not broken any rules or broken any laws.

18 Q. There are two large volumes, or I should say
19 looseleaf binders in front of you. One says
20 Exhibits. I'm going to ask you to turn to Exhibit
21 Number 35.

22 THE COURT: Did you say 35?

23 MR. STROKOFF: I did, Your Honor.

24 BY MR. STROKOFF:

25 Q. Are you able to identify what has been

1 labeled Plaintiff's Exhibit 35?

2 A. I am.

3 Q. And what is it?

4 A. This is the criminal complaint that was filed
5 by the Attorney General's Office and the state
6 police against Timothy Curley.

7 Q. And about halfway down, maybe 60 percent of
8 the way down, there's a signature. Whose signature
9 is on that?

10 A. It's my signature.

11 Q. Okay. So you were the attorney for the
12 Commonwealth on this criminal complaint?

13 A. That's correct.

14 MR. STROKOFF: Your Honor, I'd move for the
15 admission of 35.

16 THE COURT: Any objection?

17 MS. CONRAD: No, sir.

18 THE COURT: It's admitted.

19 BY MR. STROKOFF:

20 Q. I'm going to ask if you would, please, to
21 turn to page 12 of the presentment.

22 A. The presentment? Okay. Got it.

23 Q. And again, could you state what the
24 presentment is?

25 A. The presentment in this case is it's the

1 grand jury's suggestion or finding for what the
2 charges should be. And here it's attached to the
3 complaint as the, in essence, the affidavit of
4 probable cause that a police officer would
5 ordinarily attach to a criminal complaint.

6 Q. Okay. Could you turn to page 12, please,
7 again?

8 A. I'm there.

9 Q. Okay. The paragraph that's about four inches
10 up, the grand jury finds, do you see that?

11 A. Yes.

12 MR. STROKOFF: Your Honor, if I may, can I
13 project that onto the --

14 THE COURT: Yes. Page 12?

15 MR. STROKOFF: That's correct. Towards the
16 bottom. And is the -- may I inquire if the jurors
17 are able to see that, Your Honor?

18 THE COURT: Everybody able to see?

19 JUROR: Could be a little bit bigger.

20 THE COURT: Little bit bigger. Okay. Could
21 you do that? Does that help?

22 JUROR: Yes.

23 BY MR. STROKOFF:

24 Q. Would you read that, please, Ms. Eshbach?

25 A. The entire paragraph?

1 Q. Please.

2 A. The grand jury finds that Tim Curley made a
3 materially false statement under oath in an official
4 proceeding on January 12, 2011 when he testified
5 before the 30th statewide investigating grand jury
6 relating to the 2002 incident, that he was not told
7 by the graduate assistant that Sandusky was engaged
8 in sexual conduct or anal sex with a boy in the
9 Lasch Building showers.

10 Q. And the next paragraph, please.

11 A. Furthermore, the grand jury finds that Gary
12 Schultz made a materially false statement under oath
13 in an official proceeding on January 12, 2011 when
14 he testified before the 30th statewide investigating
15 grand jury relating to the 2002 incident that the
16 allegations made by the graduate assistant --

17 Q. I would ask you to hold just for a second
18 until we get that second page up there. Okay.

19 A. -- graduate assistant were quote, not that
20 serious, end quote, and that he and Curley had
21 quote, no indication that a crime had occurred, end
22 quote.

23 Q. And the grad assistant was who that this
24 presentment refers to?

25 A. Mike McQueary.

1 Q. Now, could you turn to Exhibit 36, please?
2 Could you simply identify 36 for us?

3 A. Exhibit 36 is a copy of the criminal
4 complaint charging Gary Schultz.

5 Q. And you signed that one as well?

6 A. I did.

7 Q. And is this criminal complaint very similar
8 to the criminal complaint against Mr. Curley?

9 A. Yes.

10 MR. STROKOFF: Your Honor, move for the
11 admission of Exhibit 36?

12 THE COURT: Any objection?

13 MS. CONRAD: No objection.

14 THE COURT: It's admitted.

15 BY MR. STROKOFF:

16 Q. Ms. Eshbach, with respect to these
17 allegations of criminality against Mr. Schultz and
18 Mr. Curley, what significance does Mr. McQueary's
19 testimony have?

20 A. Well, the basis for the determination of
21 perjury was founded upon Mike's testimony that he
22 had advised them that he had seen conduct of a
23 sexual nature occurring between Sandusky and a boy
24 in the showers. And there was an issue with regard
25 to the year and that the initial presentment is

1 actually incorrect on the year, but I don't think it
2 matters.

3 Q. Okay.

4 A. But the basis was that in front of the grand
5 jury then, Mr. Curley and Mr. Schultz did not agree
6 that they had been told by -- they denied that they
7 had been told about sexual conduct in graphic terms
8 by Mr. McQueary.

9 Q. And isn't there also an allegation here of
10 failure to report?

11 A. There is.

12 Q. Okay. And how significant, if at all, is Mr.
13 McQueary's testimony with respect to that charge?

14 A. Obviously, we would not have known. Had we
15 not had Mike's testimony, we would not have known
16 that there was a failure to report. We were able to
17 investigate after the fact that no report had been
18 made to the proper officials.

19 Q. Okay. We're going to come back to the
20 exhibit book in a minute. Are you familiar with the
21 website Penn State Live?

22 A. I know of it.

23 Q. Okay. As an alum of Penn State, do you have
24 any association with the University, other than just
25 being a former graduate?

1 A. I'm a lifetime member of the Alumni
2 Association if that's what you mean. I have that
3 association. I'm an alumni member of the Blue Band.

4 Q. I'm going to ask, if you would please, to
5 turn to Plaintiff's Exhibit 35. I'm going to ask
6 you to take a minute to review that. Have you done
7 so?

8 A. I have.

9 Q. Okay. Do you recall, back in November of
10 2011, reviewing this statement?

11 A. I do.

12 Q. And how did you regard this statement?

13 MR. CONRAD: Objection.

14 THE COURT: Basis?

15 MS. CONRAD: This witness is not here to
16 testify -- to provide expert testimony. This
17 witness is not here to provide expert testimony, nor
18 is her review of how she viewed this relevant to
19 this case.

20 THE COURT: Wouldn't it be relevant on the
21 defamation claim as to how it was understood?
22 Objection's overruled.

23 THE WITNESS: Would you just please repeat
24 the question?

25 BY MR. STROKOFF:

1 Q. I'll do my best. The court reporter would do
2 it better. But how did you regard this statement
3 when you read it back in November of 2011?

4 A. It was a statement by the president of the
5 University basically saying -- well, directly saying
6 that our investigation was false and wrong and that
7 Mr. Curley and Mr. Schultz would be exonerated.
8 That, in turn, meant that everything in our grand
9 jury presentments was false basically.

10 Q. And with regard to Mr. McQueary, did you have
11 any -- I mean, did you understand it that way as
12 well?

13 A. It was a direct contradiction of everything
14 Mike McQueary had said and basically indicated that
15 was wrong or was lying.

16 Q. All right. Now, at the bottom of this
17 release there are two statements, one from the
18 attorney for Gary Schultz and one from the attorney
19 for Tim Curley. What, if any, impact did that have
20 on your review of this document?

21 A. I'm not unaccustomed to defense attorneys
22 saying exactly what the attorney for Mr. Schultz and
23 Mr. Curley said, that their clients are innocent and
24 they'll defend vigorously in court. But I am
25 unaccustomed to seeing a response like Dr. Spanier's

1 response. But then again, we aren't usually
2 involved in a case involving a big university.

3 Q. Okay. I'm going to ask if you would, please,
4 turn to Plaintiff's Exhibit --

5 MR. STROKOSS: I'm sorry, did I move for the
6 admission of 39, Your Honor?

7 THE COURT: I don't think you did.

8 MR. STROKOFF: Well, then I would like to at
9 this time.

10 THE COURT: Any objection?

11 MS. CONRAD: No, Your Honor.

12 THE COURT: It's admitted.

13 BY MR. STROKOFF:

14 Q. Ms. Eshbach, please turn to 43. Are you able
15 to identify what has been labeled Plaintiff's
16 Exhibit 43?

17 A. Yes, I am.

18 Q. And just identify it.

19 A. It's an email from Mike McQueary addressed to
20 myself and Agent Sassano at the Attorney General's
21 Office email addresses.

22 Q. And the date, ma'am?

23 A. The date is November 10th, 2011.

24 Q. Okay. And you received this email?

25 A. Yes.

1 MR. STROKOFF: Okay. Move for admission of
2 43, Your Honor?

3 MS. CONRAD: No objection.

4 THE COURT: It's admitted.

5 BY MR. STROKOFF:

6 Q. Now, this email bears a time, November 10,
7 2011 at 3:10 p.m., do you see that?

8 A. Yes.

9 Q. Okay. And among other things -- I'm going to
10 ask you to go to the second page. He asked you a
11 question, the very first question. Can you read
12 that to the jury?

13 A. What are my options as far as a statement
14 from me goes? Will I be in any legal trouble, any
15 trouble with the law question mark?

16 Q. Did you respond to Mike's request that he
17 wanted to know if he could make a statement to the
18 public?

19 A. I did.

20 Q. And what was your response?

21 A. I believe that I told him something to the
22 effect that, and I'm sure there's an email somewhere
23 here about it, that while I understood it was hard
24 for him, he couldn't respond.

25 Q. Okay. So --

1 A. I told him not to respond.

2 Q. As the lead attorney on this investigation,
3 you told him not to make any public statement?

4 A. That is correct.

5 Q. And to the best of your knowledge, did he
6 adhere to your request?

7 A. Yes.

8 Q. Do you recall his state of mind at this time?

9 A. He was extremely upset. And it went on for a
10 period of days. I remember being in contact with
11 him in phone calls and emails. Maybe not emails,
12 but text messages. He was beside himself.

13 Q. But nevertheless, you asked him not to make
14 any public statement and he did not?

15 A. That's right.

16 Q. Now, there were some disturbing
17 communications which Mr. McQueary had received that
18 he sent you copies of; is that correct?

19 A. Yes.

20 Q. Did you have any concerns whatsoever for his
21 personal security?

22 A. I did not.

23 Q. He was your lead witness in three
24 prosecutions and you had no concerns for his
25 personal security?

1 A. I really was not in fear for his safety. His
2 emotional safety maybe, not his physical safety.

3 Q. All right. And do you know whether or not
4 this was discussed with anyone else in your office?

5 A. To the best of my recollection, Agent Sassano
6 and I may have touched on it briefly, but there was
7 never any discussion of taking any steps.

8 Q. No credible threats for his physical safety?

9 A. Not that we were aware of.

10 Q. Okay. And did the University ever contact
11 you and ask security questions?

12 A. No.

13 Q. You're a lifetime member of the alumni
14 association. Do you know how many members are there
15 in the alumni association?

16 A. The last time I knew, I think they had
17 exceeded 174,000 back around 2014. I haven't kept
18 up with it. But I leave we're the largest dues
19 paying alumni association in the country.

20 Q. Right. And there are plenty of graduates who
21 aren't members of the alumni association?

22 A. A ton. You can't go any place without
23 running into somebody Penn State.

24 MR. STROKOFF: All right. Pass the witness,
25 Your Honor.

1 THE COURT: Ms. Conrad.

2 MS. CONRAD: Thank you.

3 CROSS EXAMINATION

4 BY MS. CONRAD:

5 Q. Good morning.

6 A. Good morning.

7 Q. My name is Nancy Conrad, and I represent
8 Pennsylvania State University. I believe you
9 testified that at the time you were with the Office
10 of Attorney General, Tom Corbett was the attorney
11 general?

12 A. In the beginning.

13 Q. And did Attorney General Corbett go on then
14 to another position?

15 A. Yes. He became governor.

16 Q. And are you familiar with the remarks that he
17 made about Michael McQueary?

18 A. No.

19 Q. You didn't follow that the former -- that the
20 governor of Pennsylvania, while on national TV --

21 MR. STROKOFF: Objection, Your Honor.

22 THE COURT: Excuse me, the jurors are
23 apparently having a difficult time hearing you, Ms.
24 Conrad. So I don't know if that mic is on or not or
25 -- if you can get on top of this.

1 MS. CONRAD: Is this better? Okay.

2 MR. STROKOFF: Objection, Your Honor.

3 Hearsay.

4 MS. CONRAD: The information is not being
5 offered for the truth, but to show subsequent
6 events.

7 THE COURT: Okay. I need to hear the
8 question because two things were going on at once.
9 So go ahead, state the question.

10 MS. CONRAD: Were you aware of the governor's
11 statement about Mr. McQueary when he was questioned
12 on national TV?

13 THE COURT: And you answered yes or no?

14 THE WITNESS: No.

15 BY MS. CONRAD:

16 Q. Would it refresh your recollection --

17 MR. STROKOFF: Objection, Your Honor.

18 THE COURT: Let her finish the question.

19 BY MS. CONRAD:

20 Q. Would it refresh your recollection that the
21 governor, in response to questions --

22 THE COURT: Don't state what the governor
23 said. If you have something, you could show it to
24 her and then we could deal with whether or not it
25 constitutes hearsay.

1 BY MS. CONRAD:

2 Q. Take a moment and review that information as
3 reported by the press.

4 MR. STROKOFF: Do you have a copy for me?

5 MS. CONRAD: No, sir. I'm just using it to
6 refresh her recollection.

7 THE COURT: Can I have it, please? And what
8 do you want to ask her about that?

9 MS. CONRAD: Does that article refresh your
10 recollection with respect to the comments made by
11 the governor about Mr. McQueary's actions?

12 THE WITNESS: It does.

13 MS. CONRAD: Permission to proceed?

14 THE COURT: Not if you're going to ask her
15 what he said.

16 MS. CONRAD: That is my next question, sir.

17 THE COURT: Okay. And you're objecting
18 because it's hearsay?

19 MR. STROKOFF: Yes.

20 THE COURT: And what exception to the hearsay
21 rule is it?

22 MS. CONRAD: It is to establish the -- first
23 of all, it is an excited utterance by the governor,
24 number one.

25 THE COURT: Excited utterance at a press

1 conference?

2 MS. CONRAD: Yes, sir. This was a chaotic
3 time statements were being made. Number two, it's
4 being offered to show subsequent events following
5 his statement, what occurred with respect to the
6 actions at Penn State and ultimately how that
7 impacted Penn State's actions.

8 THE COURT: Objection is sustained. Which
9 means you disregard all of that conversation.

10 Counsel, if you have a problem with the
11 ruling, I suggest you don't make any facial gestures
12 or you'll find yourself out of the courtroom. Don't
13 pull a stunt like that again. Go ahead.

14 BY MS. CONRAD:

15 Q. I believe you testified that it was your view
16 that Mr. McQueary had a strong recollection about
17 the events that occurred in 2001?

18 A. Yes.

19 Q. I'm going to direct your attention back to
20 the document that was marked Plaintiff's 43, it is
21 Defendant's Exhibit 36. We need the screen up.
22 Thank you. I'm going to direct your attention to
23 the first page, the fifth line. Could you read into
24 the record the information that Michael McQueary
25 provided to you on November 10, 2011 following the

1 release of the presentment? Could you read that
2 into the record, please?

3 A. Are you speaking of the paragraph that begins
4 with I have also?

5 Q. Yes.

6 A. Thank you. I have also said clearly that I
7 cannot say one thousand percent sure that it was
8 sodomy. I did not see insertion, it was a sexual
9 act and or way over the line in my opinion whatever
10 it was.

11 Q. And am I correct that the presentment
12 provided that Mr. McQueary had observed anal sex?

13 A. That's what the presentment said.

14 Q. And in this email, Mr. McQueary is now
15 informing you that he cannot say a thousand percent
16 sure that it was sodomy?

17 A. That's correct.

18 Q. And directing your attention to the second
19 page, the fourth line. What information did Mr.
20 McQueary provide to you about how his words were
21 presented in the presentment?

22 A. The line says, "I feel my words were slightly
23 twisted and not totally portrayed correctly in the
24 presentment. I may be wrong, but is there a way
25 that Tim or I can get a copy of the actual grand

1 jury testimony?"

2 Q. Now, when you received this information from
3 Mr. McQueary that he felt his words were slightly
4 twisted and not totally portrayed correctly in the
5 presentment, did you take any action with respect to
6 that?

7 A. We had discussed with Mike what he saw and
8 didn't see and were very comfortable that what the
9 presentment said reflected his testimony.

10 Q. So, is it your testimony then you formed the
11 opinion that when he provided this information to
12 you on November 10th, he wasn't being truthful with
13 you?

14 A. No. Not at all.

15 Q. So he was being truthful when he said that
16 his words were being twisted?

17 A. I think he thought his words were being
18 twisted because he used the word sodomy in his
19 description. And we, in the editorial staff if you
20 will of the presentment, used the term anal
21 intercourse.

22 Q. But he also told you that he wasn't certain
23 that anal intercourse had taken place, didn't he?

24 A. And that was because the positions -- the
25 positioning of the bodies in the case, he was

1 incapable of seeing insertion based on the way the
2 young man was standing and the way Jerry was
3 Sandusky was standing. So insertion was impossible
4 to be seen.

5 Q. So Mr. McQueary then accurately relayed to
6 you that he felt his words were slightly twisted in
7 the presentment?

8 A. Those are his words.

9 Q. I'm going to direct your attention now to the
10 first page of the email that Mr. McQueary sent to
11 you, the ninth paragraph, it begins with the word
12 national. Do you see that information that you
13 received from Mr. McQueary?

14 A. Yes.

15 Q. And what does it provide?

16 A. National talk shows are saying the most
17 brutal things, not about the perp but about everyone
18 else.

19 Q. And were you aware of what was being reported
20 on national talk shows about Mr. McQueary?

21 A. To a certain extent.

22 Q. And he informed you about them, didn't he?

23 A. Yes.

24 Q. And if you look at the second paragraph, he
25 provided to you information about what the media was

1 reporting, didn't he?

2 A. Yes.

3 Q. And what information did he provide to you in
4 that second paragraph?

5 A. The one beginning they have said?

6 Q. Yes.

7 A. They have said quote, he is worse than
8 Sandusky, end quote. I will forward just a small
9 fraction of the emails and articles that have been
10 written to and about me people. People say I will
11 eventually get charged. With what, I have no idea.

12 Q. And did Mr. McQueary send to you some of
13 those articles that were being written about him?

14 A. Yes.

15 Q. Returning back to the second page, Mr.
16 McQueary raises a question about whether or not he
17 can make a statement, doesn't he?

18 A. Yes.

19 Q. Directing your attention to the third
20 paragraph, he asked you what are my options as far
21 as a statement from me, doesn't he?

22 A. He does.

23 Q. And I believe you testified that you informed
24 him that he could not make a statement?

25 A. I told him that he could not.

1 Q. Now, didn't you also testify that witnesses
2 before the grand jury are not prevented about
3 talking about their testimony?

4 A. Yes.

5 Q. So why -- how does that reconcile with what
6 you told Mr. McQueary?

7 A. My advice to Mr. McQueary not to make a
8 statement was based on the strengthening of my --
9 and saving of my case. I did not want him making
10 statements to the press at that time that could at
11 some time be used against him in cross-examination.
12 He was perfectly free to make a statement, but I
13 asked him not to.

14 Q. And that was because he had also provided you
15 information that his words were slightly twisted?

16 A. No. It was because I simply didn't want him
17 being out there in multiple statements.

18 Q. Directing your attention back to the first
19 page then of this email from Mr. McQueary, he
20 expressed his concern in the first paragraph about
21 how his life had changed, didn't he?

22 A. Yes.

23 Q. And he referenced how his life had been
24 changed, didn't he?

25 A. Yes.

1 Q. And what did he say about how his life has
2 been drastically changed?

3 A. Do you want me to read the entire paragraph?

4 Q. I want you to start with national media.

5 A. National media and public opinion has
6 totally, in every single way, ruined me. For what?

7 Q. And despite the fact that he's telling you
8 his life is ruined, national media, public opinion
9 has totally in every single way ruined him and that
10 he's able to make a statement, you put him under a
11 gag order?

12 A. I asked him not to talk.

13 Q. I'm going to direct your attention to another
14 email that you received from Mr. McQueary, D35.

15 A. Does that correlate to a Plaintiff's number?

16 Q. It will come up on your screen. Did you on
17 or about Thursday, March 10th in the morning receive
18 an email from Mr. McQueary?

19 A. I can't tell from what's on my screen.

20 THE COURT: Is that a defense exhibit?

21 MS. CONRAD: It's defense exhibit -- oh, I'm
22 sorry, it's the second -- the third page of D36.

23 THE COURT: D36 which is P43?

24 MS. CONRAD: I'm sorry, sir?

25 THE COURT: Is D36 and P43 the same exhibit?

1 According to the master plan, it is.

2 MS. CONRAD: Yes, sir.

3 THE COURT: Okay. So, page three of P43.

4 BY MS. CONRAD:

5 Q. So directing your attention to the third page
6 of either P43 or the third page of D36, did you
7 receive an email from Mr. McQueary on March 10,
8 2011?

9 MR. STROKOFF: You said March?

10 MS. CONRAD: I'm sorry, November 10, 2011.

11 THE WITNESS: Yes.

12 BY MS. CONRAD:

13 Q. And did that email contain some of the
14 articles that Mr. McQueary had told you were ruining
15 his reputation?

16 A. Yes.

17 Q. And directing your attention to the bottom of
18 the page, one of the emails that he forwarded states
19 what?

20 A. Fire Mike McQueary. You sicken me.

21 Q. And then in the next message, what does it
22 provide?

23 A. And I ask the Court's forgiveness for the
24 profanity --

25 THE COURT: Read it.

1 THE WITNESS: I will kill you you fucking
2 piece of shit. You help destroyed the legacy of
3 Penn State.

4 BY MS. CONRAD:

5 Q. Now, despite the fact that Mr. McQueary had
6 sent this email to you from an individual that said
7 I want to kill you, you assess that that was not a
8 credible threat?

9 A. Yes.

10 Q. Directing your attention to the next page of
11 that exhibit. Mr. McQueary forwarded another piece
12 of information that he received. Could you read
13 that into the record?

14 A. Beginning with words?

15 Q. Yes, ma'am.

16 A. Words cannot even begin to describe the
17 intensity of rage I feel for you. I will do
18 everything I can to get you fired and never work in
19 even McDonald's, let alone football. Your name has
20 been smeared forever. The legacy you left is one of
21 disgrace. You traded an advance in your career for
22 your soul. Enjoy hell. Signed anonymous.

23 Q. And having received that information from Mr.
24 McQueary, did that raise any concern for you about
25 Mr. McQueary's safety and well being?

1 A. No.

2 Q. I'm going to direct your attention now to
3 Exhibit D35? I need you to pull up the entire
4 email. Are you able to see that email in front of
5 you? It should be on the screen in front of you.

6 A. Yes. Just barely but yes.

7 THE COURT: What exhibit are we looking at
8 because that screen's useless as far as I'm
9 concerned.

10 MS. CONRAD: D35.

11 THE COURT: C?

12 MS. CONRAD: D as in Defendant.

13 THE WITNESS: And I don't have the
14 defendant's exhibits.

15 MS. CONRAD: They're behind you, sir. Volume
16 1.

17 THE COURT: I'll let you read.

18 THE WITNESS: 35, Ms. Conrad?

19 MS. CONRAD: Yes.

20 BY MS. CONRAD:

21 Q. And this is -- are you familiar with this
22 email that Mr. McQueary sent to you on Thursday,
23 November 10th?

24 A. Yes.

25 Q. And could you -- and what is it?

1 A. It's an email that he forwarded from someone,
2 Dave Vergara Public Relations.com.

3 MS. CONRAD: I would move for the admission
4 of D35.

5 MR. STROKOFF: No objection, Your Honor.

6 THE COURT: It's admitted.

7 BY MS. CONRAD:

8 Q. Now, directing your attention to the first
9 paragraph of D35, could you read into the record
10 what information you received from Mr. McQueary on
11 March 9th actually -- or March 10th. I keep saying
12 March. November. I'm sorry, I'm stuck on March.

13 A. We received it on November 10th. It's a
14 forwarding of an email from November 9th. It says
15 we're posting your name and address on our website
16 saying you helped cover up the child rapist. You
17 should have gone to police. Were you told not to?
18 You're as worse as Paterno and others. If you have
19 children, we pray they're are violently raped.

20 Q. And then the second paragraph.

21 A. You see a grown man raping a child and you
22 don't notify the police? You're going to hell
23 scumbag. Fuck you and you're entire fucking family.

24 Q. And again, despite having receive these
25 messages directly from Mike McQueary, you did not

1 have any concerns for his safety or the safety of
2 his family?

3 A. I was not concerned. It was upsetting, yes,
4 not concerned for his safety.

5 Q. And D38. Did you receive another email from
6 Mr. McQueary -- or did you respond to the email from
7 Mr. McQueary?

8 A. This is -- this exhibit is an email that I
9 wrote back to Mike about his concerns.

10 Q. And in this email, you informed him that it's
11 hard not to respond but you can't; is that correct?

12 A. That's correct.

13 MS. CONRAD: Move for the admission of D38.

14 MR. SATROKOFF: No objection, Your Honor.

15 THE COURT: It's admitted.

16 BY MS. CONRAD:

17 Q. Now, Mr. Strokoff asked you questions about
18 the charges against Mr. Curley and Schultz, didn't
19 he?

20 A. He did.

21 Q. And I believe you testified that the
22 presentment provides that -- or found that the grand
23 jury found that they had made materially false
24 statements under oath in an official proceeding,
25 didn't you?

1 A. Yes.

2 Q. Do you know the status of the perjury charges
3 against Mr. Curley and Mr. Schultz?

4 A. Those charges I believe have been dismissed.

5 MS. CONRAD: Thank you. I have no further
6 questions.

7 REDIRECT EXAMINATION

8 BY MR. STROKOFF:

9 Q. And do you know the basis for the dismissal?

10 A. There's a lengthy opinion that has to do with
11 their depravation of counsel before the grand jury.

12 Q. So, it has nothing to do with being found
13 innocent of perjury?

14 A. That's correct.

15 MS. CONRAD: Objection.

16 THE COURT: Can we have a sidebar? Tune us
17 out, members of the jury.

18 (Whereupon, the following discussion was held
19 at sidebar:)

20 THE COURT: You opened the door because the
21 opinion is very clear that all of the charges
22 against Curley and Schultz are being tossed because
23 of the bad -- Attorney Baldwin's failure to notify
24 them that she, in fact, was not their counsel and
25 then subsequently against them resulted in their

1 denial of due process and the charges were
2 dismissed. And I think the jury has the right,
3 since you are implying that the perjury counts are
4 out because of some reason that they're probably not
5 true. But in fact, that's not the case.

6 MS. CONRAD: Unless this jury's going to have
7 the option to read that lengthy opinion.

8 THE COURT: They don't have to read that
9 lengthy opinion. You've read it, they've read it,
10 I've read it, we all know what they say. And I've
11 read the order that was handed down last Thursday
12 where the AG moved to nol pros the perjury counts
13 because of the fact that a clear meaning of the case
14 was that the perjury count had to go because of Ms.
15 Baldwin's failure to protect their rights as counsel
16 of record. It's clear. And I'm not going to give
17 them that, I'm going to tell them that. Okay? You
18 can step back.

19 (End of sidebar.)

20 THE COURT: Members of the jury, with regard
21 to the perjury charges that were existing against
22 Mr. Curley and Mr. Schultz, they were what is known
23 as nol prossed by motion of the Attorney General
24 last week in Dauphin County. Dauphin County is the
25 court to which the criminal cases have been

1 assigned. And the Attorney General submitted a
2 request to dismiss the perjury charges because it
3 was clear in an earlier opinion of the Superior
4 Court that the Superior Court had intended to
5 dismiss the perjury charges against Mr. Curley and
6 Mr. Schultz in addition to certain other charges
7 that they dismissed.

8 The basis for that dismissal was the fact that
9 Ms. Baldwin who was then counsel to the University
10 appeared with Mr. Curley and Mr. Schultz and they
11 were under the impression that she was their counsel
12 and that as their counsel she would advise them
13 properly with regard to answering or not answering
14 questions before the grand jury.

15 A witness before the grand jury has the right
16 to invoke the Fifth Amendment and refuse to answer a
17 question. The clear import of the opinion of the
18 Superior Court was that when Ms. Baldwin was there
19 that she, in fact, was their attorney and should
20 have advised them to invoke the Fifth Amendment with
21 regard to certain questions that resulted in their
22 ultimately being charged. So the perjury charge and
23 all of the other charges against those two
24 gentlemen, other than the failure to report charge,
25 were dismissed for a violation of their

1 Constitutional right to be represented by counsel.
2 And it turned out that Ms. Baldwin took the position
3 that she, in fact, was council for the University,
4 not counsel for those two men individually.

5 That being the case, she had a duty to explain
6 to them very clearly, I represent the University, I
7 don't represent you in your individual capacity. A
8 person before the grand jury has the absolute right
9 to representation by counsel who will fully and
10 fairly and adequately inform them as to their rights
11 before the grand jury. So the fact that these other
12 charges are dismissed or gone away has not bearing
13 on the truth or falsity of any of the claims. Go
14 ahead.

15 BY MR. STROKOFF:

16 Q. Ms. Eshbach, I'm going to ask you to go back
17 to Plaintiff's Exhibit 43 at the very end.

18 THE COURT: Did you say 3, Counsel?

19 MR. STROKOFF: I did say 43, Your Honor.

20 BY MR. STROKOFF:

21 Q. There's a PS. Do you see that?

22 A. Yes.

23 Q. Would you read that out loud, please?

24 A. PS, to the fire Mike McQueary dot com
25 creators --

1 Q. No, I'm on 43. I'm sorry, page two of 43.
2 Plaintiff's 43.

3 THE COURT: I think you're in the wrong set
4 of exhibits. Are you in the P book?

5 THE WITNESS: I'm in the P.

6 BY MR. STROKOFF:

7 Q. Page two of Plaintiff's Exhibit 43.

8 A. Okay. Gotcha.

9 Q. That's the email which Mike sent you on the
10 10th?

11 A. Yes.

12 Q. Okay. Could you read the PS aloud, please?

13 A. PS, I have also re-watched the press
14 conference from Monday. Nowhere is there strong
15 support for me. I am sorry but there just isn't.
16 My brain and guts are telling me to be skeptical of
17 everything now.

18 Q. Now, Monday would be the prior Monday, which
19 would be the 7th?

20 A. Yes.

21 Q. And on the 5th, the press conference from
22 Graham Spanier had expressed unconditional support
23 for Mr.'s Curley and Schultz?

24 A. That's correct.

25 Q. And the press conference Monday was a press

1 conference that the Attorney General's office held
2 concerning the prosecution?

3 A. Yes.

4 Q. And he's asking if he can't make a statement
5 could somebody else make a statement for him, right?

6 A. His words speak for themselves.

7 Q. Okay. And is that something that the
8 Attorney General's Office can do?

9 A. We could make -- the Attorney General's
10 Office can choose to make statements to the press.
11 But we don't usually -- I mean, it would be unusual
12 to do supplementary press conferences. So there's
13 one press conference and done. That's what you're
14 asking me?

15 Q. Right. So this -- was this or was this not
16 an option for the Attorney General's Office for
17 practical reasons?

18 A. While it would have been an option for
19 practical purposes, it wasn't going to happen.

20 MR. STROKOFF: All right. Nothing further,
21 Your Honor.

22 RECROSS EXAMINATION

23 BY MS. CONRAD:

24 Q. So, despite the fact that Mr. McQueary had
25 informed you that nowhere is there strong support

1 for me, the Attorney General's Office took no action
2 in response to his concern?

3 A. That's correct.

4 MS. CONRAD: Thank you. I have no further
5 questions.

6 THE COURT: Ms. Eshbac, to further help the
7 jury. When a grand jury recommends a presentment,
8 does the supervising judge have any input with
9 regard to the presentment?

10 THE WITNESS: Yes.

11 THE COURT: And tell the jury what the
12 supervising judge has to do.

13 THE WITNESS: When the presentment is given,
14 read to the grand jury and they vote to approve it,
15 then it is submitted to the grand jury judge who
16 reviews it and signs it, approving it.

17 THE COURT: Okay. And I note that the
18 exhibit did not have Judge Feudale's order attached,
19 that's not your issue. But there would be an order
20 approving it?

21 THE WITNESS: Judge Feudale absolutely
22 approved this.

23 THE COURT: Okay. Either side may follow up
24 as you see fit.

25 MR. STROKOFF: Plaintiff has nothing further.

1 MS. CONRAD: I have no further questions.

2 THE COURT: Thank you, ma'am. You're free to
3 go about your business.

4 THE WITNESS: Thank you.

5 THE COURT: All right. Members of the jury,
6 I think this is an appropriate place to go ahead and
7 take our luncheon break. Fold up your note pads and
8 put them back, the court officers will take them.

9 You are, again, reminded that you are not to
10 discuss your view of this witness with anyone else
11 whatsoever. If you are going outside the building
12 to go to lunch, which I think we're all going to
13 wind up doing, please keep your juror badge on
14 because as you can see there are large numbers of
15 people here, we have no idea who's who. And again,
16 we don't want them talking about something that you
17 shouldn't hear outside the presence of everyone
18 else. Having said that, we'll be back and ready to
19 start at 1:30. Thank you.

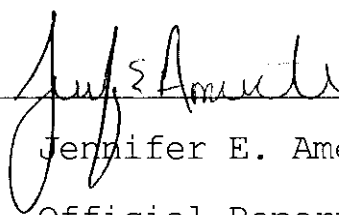
20 E N D O F P R O C E E D I N G S
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C E R T I F I C A T E

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.

11/2/16

Date



Jennifer E. Amentler

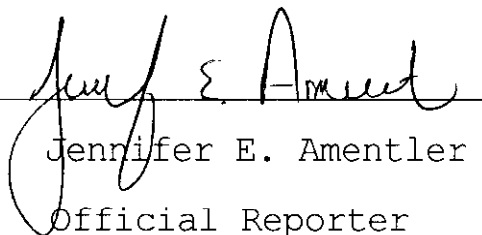
Official Reporter

C E R T I F I C A T E

I hereby certify that a copy of this transcript was furnished and made available to counsel of record for the parties, advising they had until October 24, 2016, 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.

11/2/16

Date


Jennifer E. Amentler
Official Reporter

ACCEPTANCE BY COURT

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.

11-2-16Thomas G. Gavin

Date

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