



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

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Direct Cross Redirect Recross

For Plaintiff:

(None)

For Defendant:

William Mahon 3

Index to Exhibits

Admitted:

Plaintiff:

(None)

Defendant:

(None)

The Court:

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P R O C E E D I N G S

MS. CONRAD: Your Honor, at this time the University calls Coach Matt Rhule who was unavailable to appear in person due to it being football season.

THE COURT: Okay.

(Whereupon, a video deposition was played.)

THE COURT: Members of the jury, we'll take a break. Again, don't discuss the matter with anybody.

(Whereupon, a recess was taken.)

THE COURT: Go ahead, Ms. Conrad.

MS. CONRAD: Permission to call Mr. Bill Mahon.

THE COURT: Okay.

MS. CONRAD: Thank you.

WILLIAM MAHON

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

DIRECT EXAMINATION

BY MS. CONRAD:

Q. Good afternoon, Mr. Mahon?

A. Hello.

Q. I apologize for having you to return to the courtroom and we appreciate you taking the time from

1 your day and your teaching schedule. Just to
2 refresh everyone's recollection, could you relate to
3 us the position you held at Penn State University in
4 November of 2011?

5 A. I served as vice president for University
6 relations.

7 Q. And I'm not going to take you back through
8 your job duties or any of your previous testimony
9 since the jury already heard that, I'm going to just
10 focus on some follow up questions. I believe I had
11 asked you at that time in November of 2011, was your
12 office monitoring the news media in terms of
13 articles that were being published?

14 A. Yes. That was routine for years in the
15 office.

16 Q. And did there come a point in time that there
17 was increased activity with respect to the number of
18 news articles that were being numbered by your
19 office?

20 A. Yes. In that day or two leading up to the
21 presentment, there was a lot more attention in the
22 press.

23 Q. And how about throughout that week? Did it
24 die down? Did it increase?

25 A. Yeah. It built during the course of the week

1 as many more reporters showed up in town in person
2 to cover different story angles.

3 Q. And did the articles that were being
4 published that your office were -- was monitoring,
5 did they increase during that week?

6 A. Absolutely. Probably the most coverage I've
7 ever seen for a story at Penn State.

8 Q. I want to direct your attention to the binder
9 marked Defendant's Exhibit Volume 1. I'm not sure
10 if that's what you have in front of you, but if you
11 could check.

12 A. Defendant's Exhibits Volume 3.

13 Q. We need to find Volume 1, sir.

14 A. Yes.

15 Q. I want to direct your attention to tab 76.

16 A. Yes, I have it.

17 MS. CONRAD: And Your Honor, I believe that
18 -- strike that.

19 BY MS. CONRAD:

20 Q. Is tab -- is the article contained at tab 76
21 one of the articles that your office was monitoring
22 in November of 2011?

23 A. I have no idea if it was exactly one of the
24 hundreds of stories that we saw each day. It's the
25 kind of story we would have been looking for.

1 Q. And is it the kind of story that you were
2 looking for in terms of monitoring the content that
3 was being published by the media?

4 A. Yeah. We would be looking for anything
5 related to this particular case that had Penn
6 State's name in it.

7 MS. CONRAD: Permission to publish, sir.
8 This article has already been admitted.

9 MR. STROKOFF: Your Honor, again --

10 THE COURT: The article was admitted as I
11 understand it over the objection of the defense.
12 Again, with regard to it was admitted to show what
13 was out there, not the truth of the matter here.

14 MS. CONRAD: Yes, sir.

15 THE COURT: And what purpose is showing this
16 article now?

17 MS. CONRAD: To show what was out there in
18 the media with respect to what the media was
19 reporting about Mike McQueary.

20 THE COURT: There's plenty of that in the
21 record already.

22 MS. CONRAD: Your Honor, this witness has not
23 yet had the opportunity to testify as to his
24 office's involvement with this article. We stopped
25 at article 71 when he was previously here prior to

1 your ruling.

2 MR. STROKOFF: And if I may, Your Honor. The
3 problem is, he hasn't identified even one article
4 that he said this is one that we monitored and this
5 is one that we took action on. So --

6 THE COURT: Well, again, I have Exhibits 71
7 and 72 admitted without objection, 73 and 74
8 admitted over objection, 75 wasn't moved, 76 was
9 admitted over objection. Again, the difficulty with
10 putting these things up and saying well, it's just
11 up for what was out there and not the truth of the
12 matter as asserted, you got the matter that's
13 asserted. And you can ask him what he did as a
14 result of these articles, you're not going to be
15 permitted to publish it.

16 MS. CONRAD: Your Honor, may I approach?

17 THE COURT: Yes.

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

20 MS. CONRAD: Matt Rhule just testified and he
21 made that Mr. McQueary's reputation may have been
22 hurt by things that were being said about him in the
23 media. Other witnesses have testified.

24 THE COURT: Agreed.

25 MS. CONRAD: And this witness is prepared and

1 has testified that these were the types of articles
2 that were being monitored by his office. As a
3 result, it is -- I respectfully request the
4 opportunity, just as Mr. Strokoff cough had the
5 opportunity to publish the content of articles, to
6 simply publish the headline of this article.

7 MR. STROKOFF: Your Honor --

8 THE COURT: This is the opinion of someone
9 that's writing a magazine article and you're saying
10 what he says. So, how does that -- publishing that
11 not -- what's the rationale for publishing the
12 article? I'll have you explain it to me more
13 clearly.

14 MS. CONRAD: The rationale for publishing it,
15 sir, is number one, Mr. McQueary has testified that
16 national media and public opinion ruined his
17 reputation. Now, at least several other witnesses,
18 including the last witness, have testified that Mr.
19 McQueary's reputation and particularly his ability
20 to continue in the profession of college football
21 coaching could very well have been hurt by things
22 said about him in the media.

23 THE COURT: So you can very easily say, does
24 this article reference what it is that Mr. McQueary
25 saw and did not do and does it criticize him of that

1 fact?

2 MR. STROKOFF: The problem I have, Your
3 Honor, is that he can't everyone verify that he ever
4 even saw this. This is something that somebody
5 pulled off the internet. So he's not even saying
6 this is what we monitored, this is what he sent up
7 to the central office to tell them here's what the
8 press is saying, we got to do something. It simply
9 has no relevance.

10 THE COURT: So if can't identify it -- ask
11 him that question first, if he can't identify it,
12 then on what basis does it come in?

13 MS. CONRAD: As Your Honor has previously
14 ruled that news articles --

15 THE COURT: You have so many news articles in
16 here it's over the top. Both sides. Both sides
17 have so many that if this jury hasn't figured out
18 that the news media is accusing him of not being a
19 man, that's the argument, what should have done,
20 this article is no different.

21 MS. CONRAD: I have not had the opportunity
22 to publish this headline. And I will pick two
23 headlines, if permitted. Mr. Strokoff has been
24 permitted to publish contents of news articles
25 without having a witness verify them because, based

1 on Your Honor's ruling, that these articles are
2 exceptions to the hearsay rule.

3 THE COURT: I don't recall that. I think we
4 went back and forth on this issue so many times that
5 I feel like a fish flopping one way or the other.

6 MS. CONRAD: My recollection, sir, is you
7 specifically told me, if you've been prejudiced,
8 bring a witness back for that purpose after allowing
9 Mr. Strokoff to read from a news article.

10 THE COURT: And you can simply ask him, was
11 the media coverage directed to the sexual incident
12 and Mr. McQueary's response to that incident? And
13 that solves the problem.

14 MS. CONRAD: Was the media coverage related
15 to --

16 THE COURT: Addressed the sexual conduct that
17 Mr. McQueary saw and what did and did not do.

18 MS. CONRAD: Was the media article related to
19 an incident that Mr. McQueary observed with Mr.
20 Sandusky and what he -- how he responded the night
21 -- if I could just read the headline, it would be so
22 much easier.

23 MR. STROKOFF: Really, the thrust of the
24 headline is he should be fired. That's what it
25 says. Not all this other stuff.

1 MS. CONRAD: It does not go to -- he was not
2 fired. That's not the issue in this case. He's
3 claiming that his reputation has been injured. This
4 article goes directly to the reputational claim that
5 he is making. And I say for the third time, Mr.
6 Strokoff was permitted.

7 THE COURT: That's the solution that I'm
8 giving you. If I'm wrong, you have the point for
9 appeal.

10 MS. CONRAD: May I see the headline? I want
11 to be sure I raised the question without issue.

12 THE COURT: I recall this man talking about
13 New York Times articles, Washington Post articles,
14 and I think they were displayed to the jury and they
15 all essentially went down the same way. I mean, I
16 don't even understand why you're recalling him on
17 this point, but it's your witness and deal with him
18 as you.

19 MS. CONRAD: I'm recalling him, sir, because
20 you changed your ruling with Mr. Strokoff was
21 introducing a media article. And you told me to
22 address it. And I believe we were directed to stop
23 publishing at Exhibit 72. And we checked the
24 transcript for that purpose, sir.

25 THE COURT: You're right. I was looking at

1 72, which went in without any objection.

2 MS. CONRAD: Does the media article contained
3 at Exhibit 75 address Mr. McQueary's actions on the
4 night he saw Jerry Sandusky in the shower with a
5 young child?

6 THE COURT: Okay.

7 MR. STROKOFF: Your Honor, may I get my
8 exhibit list? I have notes on mine as well.

9 THE COURT: Go ahead.

10 MS. CONRAD: And if I might add, you may
11 recall that Mr. Strokoff was permitted to read from
12 a news article, and it wasn't even text from the
13 news article, it was a comment that was posted in
14 response to the article. And he was permitted to
15 read the entire text messages.

16 THE COURT: Which exhibit was that?

17 MR. STROKOFF: That was 91, Your Honor. That
18 was a time stamped comment somebody made to a
19 newspaper article at 6:00 a.m. saying that the
20 graduate assistant is Mike McQueary.

21 THE COURT: You're telling me you established
22 when in point of time someone from the chain of
23 command would know it was Mr. McQueary?

24 MR. STROKOFF: Well, I put in a number, yes.

25 THE COURT: Yeah.

1 MR. STROKOFF: It was just the time stamp.

2 MS. CONRAD: He was permitted to put in a
3 number of them and read from the articles.

4 MR. STROKOFF: They weren't published.

5 THE COURT: Give me my 76 back. That's the
6 resolution. You have the right -- you have an
7 exception. You can put on a record later each of
8 the exhibits that you wanted to have the witness
9 address and publish to the jury so it's all
10 preserved.

11 MS. CONRAD: Then am I permitted to ask the
12 questions as Your Honor has directed with respect to
13 these articles that were not previously --

14 THE COURT: I'm saying that you can ask him,
15 among the articles you were monitoring, your office
16 was monitoring were there articles along the lines
17 of the gist of what he just said.

18 MS. CONRAD: Okay. And you want me to do
19 that one time, sir?

20 THE COURT: Well, Mr. Strokoff has already
21 objected that this man can't say, and I doubt that
22 he will say, that he ever even saw this article. So
23 I think I'm going a little further for you by
24 allowing you to get it in. Because if we go to each
25 article individually and he says no, no, no, no,

1 then you don't get to question anymore. So it's
2 your call.

3 MS. CONRAD: I will ask the single question,
4 sir, based on your direction.

5 THE COURT: Thank you.

6 (End of sidebar.)

7 BY MS. CONRAD:

8 Q. Mr. Mahon, the media articles contained at
9 tab 76, I believe you're there?

10 A. Yes.

11 Q. Is that media article -- does that media
12 article that your office was monitoring address Mr.
13 McQueary's actions on the night he saw Jerry
14 Sandusky in the shower with a young child?

15 A. I haven't read this article.

16 Q. I understood. But if you look at the first
17 -- at the headline.

18 A. Yes.

19 Q. Having looked at the headline of this
20 article, without reading it, does this headline
21 address Mr. McQueary's actions on the night he saw
22 Jerry Sandusky in the shower with a young child?

23 A. Yes, it does.

24 MS. CONRAD: Thank you. I have no further
25 questions.

1 MR. STROKOFF: No questions, Your Honor.

2 THE COURT: Thank you. You can go back to
3 whatever you were doing.

4 MS. CONRAD: Your Honor, at this time we
5 request permission to load the second video.

6 THE COURT: Yes.

7 MS. CONRAD: Thank you, sir.

8 Your Honor, at this time, permission to show
9 the video deposition of Coach Bill O'Brien who was
10 not available to appear in person because it is
11 football season.

12 THE COURT: Okay. Thank you.

13 (Whereupon, a video deposition was played.)

14 MS. CONRAD: At this time, the University
15 rests.

16 THE COURT: Okay. Members of the jury, you
17 have now heard all of the testimony in the case.
18 Tomorrow morning we will have the closing arguments
19 and the charge of the Court. When you arrive
20 tomorrow, just procedurally, I think they're going
21 to have menus for you so we don't have to have chili
22 and peppermint patties for lunch, you're going to
23 get something else for lunch.

24 My thinking is that if the timeline stays as I
25 envision it, and we all know it doesn't work that

1 way all the time, but if it does, that the attorneys
2 would close, I would charge, you would go out to
3 deliberate and the lunches would be there. And I
4 would suggest, if that timeline holds true, you just
5 have a relaxing lunch and then when you're finished
6 with lunch, you begin your deliberations and you
7 take whatever amount of time is necessary.

8 So at this point in time the only thing each
9 of you individually should have decided is who and
10 what you believe of the testimony that you've heard.
11 You're not clearly in a position to decide anything
12 because you have to hear the arguments of the
13 attorneys and the instructions of the Court. And
14 then you're going to have to go in there and arrive
15 at a collective decision. It's not an individual
16 decision, you have to agree collectively, and I'll
17 tell you all about that tomorrow.

18 So having said all of that, have a safe trip
19 home, we'll see you here tomorrow morning ready to
20 go.

21 (Whereupon, the jury was excused for an
22 overnight recess.)

23 THE COURT: There's a couple items of
24 housekeeping that I want to make sure that are taken
25 care of before I forget it. And the two videos, I

1 take it we've got copies that are marked and going
2 to be introduced because the reporter wasn't taking
3 them.

4 MS. CONRAD: Yes, sir. Do you want the
5 transcript?

6 THE COURT: Well, how do we know what was
7 read? I mean, we have the video of Rhule. Is there
8 a written transcript where you folks went through
9 and you designated what pages were being done?

10 MS. CONRAD: Yes, sir.

11 THE COURT: I mean, it will be easier for me
12 to have the transcripts that way. And while I'm
13 saying that, that's all part in parcel of the
14 whistle blower claim because I'm assuming that
15 everyone would prefer to have findings of facts and
16 conclusions of law written. And the rule says I
17 should do that within seven days, and I can tell you
18 I have been trying at night to keep up with the day
19 before's making findings, et cetera, and there's no
20 way in a realistic sense that I can review all of
21 the notes of testimony and everything and have a
22 cogent decision within seven days. If you want one
23 off the top of my head, great. If you want a
24 reasoned decision, then we're going to have to wait.

25 I'm not going to delay you, but I'll tell you

1 the real world in which I work, I'm supposed to go
2 to North Carolina next week to my brother-in-law's
3 for a couple days, not the whole week. After that,
4 I go back to my own county to deal with the grand
5 jury and my own people for two weeks. But that does
6 not prevent me from working at night at home. So I
7 would anticipate that I would have reread everything
8 and been making my findings and probably have them
9 not the end of next week but probably by the middle
10 of the following week.

11 Now at one point in time, Ms. Conrad, you
12 indicated that you wanted to have proposed findings
13 or to have some argument before we made any
14 decision. I'm willing to accept anything that you
15 want to submit. I think the law side is going to be
16 more helpful than the fact side, but I don't want to
17 preclude either side from what it is that you'd like
18 to do. So maybe we think about that tonight and you
19 can tell me tomorrow what your pleasure is in that
20 area.

21 Second thing, when I went upstairs today to my
22 home away from home, I was expecting a packet of
23 documents from my own county, and they were there.
24 On top of it was a letter from a Mary Shirey,
25 S-H-I-R-E-Y, which I opened. And as soon as I

1 opened it, I could see that both of you were copied.
2 And then I saw that she was beginning to comment
3 about the whistle blower case. I immediately folded
4 up the letter, stuck it back in the envelope, and
5 did not read the letter. You two folks are going to
6 have a copy of whatever she said to me. But I'm
7 just telling you that as soon as I realized she was
8 addressing the matter, I folded the letter up and
9 put it back and I have not read it, and I have no
10 intention of reading it. But we'll mark it as a
11 court exhibit and just keep it with the file, but I
12 wanted you to be aware that that occurred.

13 MR. STROKOFF: Her name again, Your Honor?
14 Mary Shirey?

15 THE COURT: Yes. I think both of you, when I
16 took a quick look at it, I saw at the bottom that
17 both of you were copied in.

18 MR. STROKOFF: My office has gotten a number
19 of communications since the trial started.

20 THE COURT: So thankfully, this is the only
21 one I got and I didn't read it and I have no
22 intentions of reading it. It has no bearing on my
23 decision in the matter.

24 Okay. Now, the other thing is when you read
25 the stipulation in the other day with regard to

1 Curley and Schultz, as you were reading it, Mr.
2 Strokoff, it didn't seem to sync up exactly with
3 what was written. And I don't know because there
4 were various permutations of the document whether I
5 had the most recent one in front of me.

6 MR. STROKOFF: The one we handed up was
7 signed, Your Honor, and I think it was dated
8 Tuesday, I can go dig it out. But it was signed by
9 both Ms. Conrad and I and dated.

10 THE COURT: Okay. So what exhibit was it
11 turning out to be because I have stipulation that
12 was a draft and then I have a stipulation without
13 signatures?

14 MR. STROKOFF: This is it. It's signed and
15 dated on the second page, Your Honor.

16 THE COURT: Right. Okay.

17 MR. STROKOFF: But I didn't label it as an
18 exhibit.

19 THE COURT: Well, what I had, as you were
20 reading, on the copy that I had, that I didn't have
21 the signed one, I made a note that you began to add
22 some language that wasn't in the copy I had. But it
23 is in this one. So you didn't do anything you
24 weren't supposed to do, you just threw me off when I
25 was looking at the document saying wait a minute,

1 it's not what I have in front of me.

2 Okay. So, the stipulation has not been marked
3 as an exhibit; correct?

4 MR. STROKOFF: That's true.

5 THE COURT: Okay. So we're just going to
6 mark it as Court Exhibit Number 2 and then that way
7 we got the stipulation covered. So I can tear this
8 one up.

9 Let's talk just briefly about exhibits. What
10 is your feel as to exhibits that you would like to
11 see go out initially or is it your preference we
12 wait until they ask for things? It seems to me the
13 Spanier letter ought to go out, although they've had
14 so many opportunities to write it down word for
15 word, if they don't have it I don't know that giving
16 it to them is going to be any advantage. The rest
17 of it, I have no idea where to begin as to what it
18 is that logic says would help them in their
19 decisionmaking process. So I think I'm okay with
20 giving them Spanier and then beyond that, I'll hear
21 you. I'll hear you whether you want them to have
22 Spanier or not and then anything else you think they
23 might want before we tell them you can ask and then
24 we'll decide.

25 MS. CONRAD: Your Honor, my preference would

1 be to wait and see if they ask. To send just the
2 Spanier statement is to highlight that exhibit, and
3 I would prefer that we would have the opportunity to
4 see more than one exhibit as opposed to just sending
5 one exhibit.

6 MR. STROKOFF: Your Honor, there are a number
7 of exhibits we think the jury ought to have. One is
8 the Schultz handwritten note of 2/12/01, I believe
9 it's Plaintiff 7, where he specifies the plan, what
10 they plan to do; Courtney's time sheet of the day
11 before.

12 THE COURT: Just give us exhibit numbers so
13 we can all be looking at the --

14 MR. STROKOFF: I'm going to need about five
15 or eight minutes to do that.

16 THE COURT: Okay. So you need some more time
17 before you're ready?

18 MR. STROKOFF: Yes.

19 THE COURT: Okay. Why don't you just take
20 the five minutes and pull up all the exhibits that
21 you want to go out with the jury and make sure Ms.
22 Conrad has an opportunity to know and then we can
23 discuss what we want to do with those. We'll give
24 you ten minutes.

25 (Whereupon, a recess was taken.)

1 MS. CONRAD: I go back to my original
2 preference that we wait to see what the jury wants.

3 THE COURT: And I'm not saying that I
4 disagree with you, counsel, but I also know it might
5 be helpful to us if we had the numbers up front so
6 that if they ask for any of these, everybody will
7 have had a moment to think about what their position
8 is regarding that particular exhibit.

9 So the simple matter will be, Mr. Strokoff, we
10 all have each other's emails, so you can email the
11 list later to everybody. And we all have our books
12 to strengthen our arm muscles and we'll carry them
13 home and look at whatever it is you want. And
14 tomorrow morning when we come in, to the extent that
15 it's necessary to discuss anything, at least we'll
16 have had a chance to look in advance of what you're
17 talking about. Okay?

18 MR. STROKOFF: Okay, Judge.

19 MS. CONRAD: Yes, sir.

20 THE COURT: Okay. So as I understand it,
21 each side has had the other side's proposed points
22 and has the opportunity to comment. I mean, it's
23 going to be pretty straightforward. The basic
24 instruction is the the basic instruction, and I
25 don't think your input on that is necessary. I

1 mean, we're going to have to talk about expert
2 witnesses, stipulations, depositions, admissions,
3 things of that nature, all of which we'll cover.
4 And my usual practice is to cover what I think needs
5 to be covered and then ask you at a sidebar in case
6 I've missed something that you think I should have
7 added and before I tell the jury I'm done with them,
8 you can make your suggestions and if appropriate,
9 we'll make corrections or additions to the charge.

10 So, the basic guts of it is really the
11 defamation and I've already indicated that in my
12 view, Mr. McQueary is not a public figure as of the
13 date that all of this unfolded. Clearly, he's a
14 public figure now, but we're looking at November of
15 2011. So the defamation charge will track a
16 nonpublic figure person.

17 Now, I'll hear whatever you want to say on
18 that other than, again, I think he's a public
19 figure. So I mean, again, my intent is to give the
20 standard charge, so it should not come as a surprise
21 to anybody.

22 MS. CONRAD: Again, we would reassert our
23 position that Mr. McQueary inserted himself into --
24 was inserted into the public domain and as counsel
25 himself introduced through his article by I believe

1 it was November 6th, 2011, counsel introduced an
2 exhibit that Mr. McQueary's name had been published
3 that clearly put him into the center of that
4 controversy. And on that basis, his involvement in
5 that controversy being in the center of that
6 controversy, as council has noted, his name being
7 published, his name then being cast across the
8 public domain puts him into the role as a limited
9 public figure, a limited purpose public figure.

10 THE COURT: Okay. We understand your
11 position and we disagree because certainly Mr.
12 McQueary did not insert himself into the process.
13 He got inserted for being a participant in an
14 investigation. So we agree to disagree, you got the
15 point pre served.

16 So with that understanding and understanding
17 that it's going to be the standard charge, do you
18 have any comment about the standard charge? Or do
19 you want some amendments, modifications, or
20 whatever?

21 MR. STROKOFF: Your Honor, in our proposed
22 points for charge, which we sent in September 29th I
23 guess it was, we basically used the standard charge
24 but we added some language with respect to the
25 particular case, I guess beginning in the third

1 paragraph.

2 THE COURT: Okay. So, what page are we on?

3 MR. STROKOFF: It's page 10.

4 THE COURT: Page 10. So everybody grab page
5 10 of Plaintiff's point. The third paragraph?

6 MR. STROKOFF: The third paragraph was
7 modified somewhat. And then I do believe that I
8 also made a modification on page 11. I amplified a
9 little bit, I think the standard charge says that
10 that's not necessary that the communication
11 specifically refer to the individual. And cited a
12 case, therefore.

13 THE COURT: Well, we're not going to be
14 citing any cases in the process. But I don't recall
15 when I read it that I had any difficulty with that.
16 So what's the defendant's position?

17 MS. CONRAD: Well, first -- and Elliot, I'm
18 presuming that your changes are these highlighted
19 portions; is that correct? Your additions on page
20 10.

21 MR. STROKOFF: I don't have anything
22 highlighted on page 10.

23 MS. CONRAD: Then that would be my objection
24 starting with --

25 THE COURT: Wait. I don't have anything

1 highlighted.

2 MS. CONRAD: Okay. Then that would be what
3 we would be objecting to. The statement and
4 communication is any act by which a person or entity
5 brings an idea to another's attention. A
6 communication may be made by speaking or by writing
7 words or by another act or combination of acts that
8 result in bringing an idea to another's attention.
9 That is so confusing and not part of the standard
10 instruction that -- we propose we go directly to a
11 communication is defamatory.

12 MR. STROKOFF: I must plead a little memory
13 frailty here, Your Honor. But my expectation was
14 that this language, fortunately or unfortunately,
15 was in the standard charge.

16 THE COURT: That's what I got. So --

17 MS. CONRAD: The first paragraph?

18 MR. STROKOFF: Yeah. And I'm not defending
19 the standard charge.

20 THE COURT: I believe that language is right
21 out of the standard charge 17.100. And again, I
22 haven't checked it again but I believe that's the
23 exact language of the standard charge. And so, the
24 only addition an entity because of course we're not
25 talking about the person in Penn State, we're

1 talking about an entity.

2 So, again, we're going to read the standard
3 charge. We will, of course, make certain that we
4 have the exact language. I don't have the standard
5 charge in front of me, but I took that from what I
6 understood to be the standard charge. So we will be
7 reading the standard charge and everybody will have
8 had the opportunity overnight to go look at the
9 standard charge and make sure we're on the same
10 page.

11 So if that's your objection as to that
12 paragraph, again, it's the Court's belief that the
13 plaintiff's point at page 10, number nine, first
14 paragraph accurately states the standard charge and
15 that's what we would read. So what else in that
16 language do you want to address?

17 MS. CONRAD: Statement, a communication that
18 implies a person has committed a crime is
19 defamatory. I don't believe that's in the standard
20 charge.

21 THE COURT: Okay. Again, where are we in the
22 statement?

23 MS. CONRAD: The second paragraph, last line
24 in section nine. That statement, sir --

25 THE COURT: That's an option -- and again,

1 the standard charge, that's an option.

2 MS. CONRAD: It would be our position that
3 that statement implies a legal -- or draws a legal
4 conclusion. We proposed that a statement is capable
5 of defamatory meaning if it implied that the
6 plaintiff committed a crime.

7 THE COURT: Which page of your instructions
8 are you looking at, counsel?

9 MS. CONRAD: Your Honor, I believe we
10 submitted to you an instruction at number 30 through
11 38.

12 THE COURT: 30 to 38, okay. I'm there at 30.

13 MS. CONRAD: What we conveyed to you was our
14 objection to their -- to Plaintiff's proposal. We
15 did that in a letter to you.

16 THE COURT: I have your letter.

17 MS. CONRAD: We have it -- we could print it
18 for you, sir, we have it on the laptop here.

19 MR. STROKOFF: What page on the letter,
20 Nancy?

21 THE COURT: Looks like page three if she's
22 talking pages.

23 MS. CONRAD: Last paragraph of the bottom of
24 the letter.

25 THE COURT: Page three. Well, as I say, that

1 is an option under defamatory. And you're
2 suggesting that if a person -- if the language
3 infers that a person has committed a crime that that
4 is not, per se, defamatory, that you're --

5 MS. CONRAD: I'm saying that is a legal
6 conclusion, sir.

7 MR. STROKOFF: I thought that's what the
8 instructions to the jury were.

9 THE COURT: Right. If they find that the
10 language suggests that Mr. McQueary committed
11 perjury, the commission of perjury is a crime. And
12 if they find that the statement, in fact, suggested
13 that he had committed a crime, that is, per se,
14 defamatory. I don't understand your position.

15 MS. CONRAD: That is a conclusion, though.

16 THE COURT: If that's your position that it
17 states conclusion, we're going to go with the
18 standard instruction. I understand your position.

19 THE COURT: What else with regard to the --

20 MS. CONRAD: Your Honor, could we just
21 revisit that one more time? Could we say a
22 communication that implies a person has committed a
23 crime is capable of being -- having a defamatory
24 meaning, as opposed to is defamatory.

25 THE COURT: Because if you say I committed a

1 crime and somebody believes that you said I
2 committed a crime, you defame me if I haven't
3 committed the crime. So I'm going to tell the jury
4 that look, in this case they have to find that Dr.
5 Spanier's article applies, first of all, to Mr.
6 McQueary; and that when they read it, they have to
7 understand that the message was whether stated
8 implicitly or explicitly that Mr. McQueary was not
9 truthful before the grand jury; that, in fact, Mr.
10 McQueary is the one who was committing perjury
11 before the grand jury.

12 If they find that, in fact, Mr. McQueary was
13 truthful and if they find that that article
14 suggested that he was not truthful and therefore,
15 committed perjury, that that, in fact, is defamatory
16 per se because they accused -- the article has
17 accused him of committing a crime. I don't know of
18 any other way to get around it.

19 MS. CONRAD: Yes, sir.

20 THE COURT: Another issue -- I mean, there's
21 no issue about the publication, it's -- the
22 defamatory argument is simple. You're going to say
23 not anybody on the face of the earth could have
24 figured out he was Mike McQueary that they're
25 talking about. And he's going to say everybody on

1 the face of the earth could figure it out. And
2 depending on how the jury of 12 figures it out,
3 we're going to have a verdict one way or the other.

4 MS. CONRAD: Yes, sir.

5 THE COURT: Okay? So we okay on the
6 defamation?

7 MS. CONRAD: In addition, we suggested that
8 several instructions be added, and it may be in your
9 standard, that Plaintiff, in his instructions,
10 failed to state that the burden, it is the
11 plaintiff's burden in proving defamation.

12 THE COURT: I will make very clear who has
13 the burden of proof.

14 MS. CONRAD: That the burden is on the
15 plaintiff to prove that the communication was with
16 that -- no, strike that. The plaintiff does not
17 include an instruction regarding the expression of
18 opinion.

19 THE COURT: Okay. Let's take it one at a
20 time. You and your sidekick were nodding heads in
21 disagreement with each other, so I'm not certain
22 what your position was with regard to the comment
23 before the opinion. So give me some help as to what
24 page we're on.

25 MS. CONRAD: I mistakenly added the burden

1 for the public figure. So I'm withdrawing that
2 comment.

3 THE COURT: Fine. So then, of course -- so
4 you want an instruction that if the jury concludes
5 that this is his expression of opinion only, that
6 it's not capable of the defamatory meaning? Is that
7 essentially what you're asking what -- where's the
8 instruction?

9 MS. CONRAD: It's Defendant's instruction
10 number 34 as well as a suggested jury instruction at
11 number 17.150.

12 THE COURT: Just a sec. One at a time. So
13 the problem becomes, and this, again, has been, at
14 least in my mind, the focus of where we're at
15 because you want to read the sentence, and I can't
16 quote it exactly, that Dr. Spanier says in my
17 opinion at the end of the day, you know, all of this
18 will be done and, you know, the findings of the
19 grand jury are not correct. And the plaintiff's
20 position is look, anybody who reads that is going to
21 be focusing on the language, you know, that the
22 findings of the grand jury are a bunch of lull.

23 MS. CONRAD: The statement doesn't refer to
24 the findings of the grand jury.

25 THE COURT: No. But it says --

1 MS. CONRAD: That --

2 MR. STROKOFF: I am confident that the record
3 will show.

4 THE COURT: Right.

5 MR. STROKOFF: And, Your Honor, to some
6 extent, I have to agree that with respect to a pure
7 expression of opinion is protected, however, an
8 expression of opinion that implies that there are
9 undisclosed facts is not protected. And there's a
10 lot of precedent on that. And a number of witnesses
11 testified they didn't know on what basis. There's a
12 number of University employees, they didn't know on
13 what basis Dr. Spanier -- they didn't know what
14 basis that statement was based. And that's why I
15 don't think that the expression of opinion, a charge
16 is warranted.

17 And in particular, there was a United States
18 Supreme Court case quite some time ago, Milkovich,
19 where the United States Supreme Court weighed in and
20 said that the connotation that the petitioner
21 committed perjury sufficiently factual to be
22 susceptible to being proved to be false and
23 therefore is actionable. So that's why I think that
24 the expression of opinion defense just isn't really
25 applicable here because he didn't set forth -- the

1 reason why I think they're going to be found these
2 -- charges are going to be groundless at the end of
3 the day is because of A, B, C, D, E. He said -- and
4 he did say I've known these guys for a long time and
5 they're honorable guys and I'm confident, but he
6 didn't say what the other basis was.

7 MS. CONRAD: He clearly testified that it was
8 his opinion. Every University employee that
9 testified, almost everyone, I haven't gone back and
10 checked the record testified that they viewed it as
11 an opinion, as an expression of opinion by Dr.
12 Spanier which was based upon his 16 years of working
13 with Mr. Curley and Schultz.

14 MR. STROKOFF: And Dr. Spanier also testified
15 that what he didn't disclose in his statement was
16 that he was relying upon what they told him in that
17 brief heads up in February 12th or something like
18 that, 2001. That's the undisclosed fact. There's
19 some other undisclosed facts that he didn't disclose
20 also. But that's why I don't think that that
21 expression of opinion standard charge is applicable.

22 THE COURT: Well, we'll let you know tomorrow
23 morning. I suggest you be in by 8:15 so we can tell
24 you exactly what we're seeing on that point.

25 MR. STROKOFF: You said 8:15, Your Honor?

1 THE COURT: 8:15. What else, counsel?

2 MR. STROKOFF: The big one is adverse
3 interest, Your Honor.

4 MS. CONRAD: There's still more with respect
5 to defamation if we want to keep proceeding.

6 THE COURT: Okay. I'm asking.

7 MS. CONRAD: I didn't know if Elliott was
8 jumping in.

9 MR. STROKOFF: I'm sorry.

10 MS. CONRAD: We proposed -- moving on to
11 University instruction 37, truth as a defense. We
12 would request that the complete instruction be
13 given.

14 THE COURT: 37? And how is the University
15 going to and what evidence did the University
16 present that the statement was more likely true than
17 not? Because the point you've given me, an
18 essential element of defamation is the statement
19 published was false consequently. If the statement
20 was, in fact, true there could be no defamation
21 regardless of the University's motivations. The
22 University has the burden to prove that the
23 statement was more likely true than not. And how do
24 we prove that on the facts of the case that exist?
25 Dr. Spanier says I know these guys, they're great

1 guys and I have complete confidence in them. And we
2 know that they've already survived multiple trips to
3 the appellate court, and that I'm assuming some date
4 has been scheduled for the trial on the very issue
5 that is before this Court. So I don't know how you
6 would get that instruction given the correct factual
7 setting of the cases.

8 MS. CONRAD: Because, Your Honor, the
9 statement does not say that the charges are
10 groundless. It states his opinion that the record
11 will show that the charges are groundless.

12 THE COURT: Okay. So you have the burden of
13 proving that statement and how did you go about
14 doing that in this case?

15 MS. CONRAD: By Dr. Spanier testifying that
16 he based that opinion that the record in the future
17 will show that the charges are ground less based on
18 having worked with them the past 16 years which
19 includes the time period in question.

20 THE COURT: No. Because the problem with
21 that construct is that Dr. Spanier never read the
22 presentment at the time he made the statements.
23 General counsel never read the statement at the time
24 that it was prepared. And frankly, it's quite
25 surprising to me that general counsel, having spent

1 several years in the attorney general's office,
2 advising to, a head of 16 counties would have so
3 lively disregarded a presentment of the grand jury
4 as to allow even language such as that expressed as
5 an opinion. So no, that charge is not going to be
6 given, or that instruction because clearly, the
7 objective evidence at this moment is that Dr.
8 Spanier may come to regret that he said the words
9 that he said, but that's not for us to decide. But
10 on this record, you have not shown any evidence that
11 the statement was more likely true than not true.
12 So that's refused, 37. You have your exception.
13 Anything refused, you don't have to say you have
14 your exception.

15 MS. CONRAD: Thank you. Looking at the
16 instruction with respect to damages.

17 THE COURT: My hearing is getting truly bad
18 because I kept thinking that your finance guy was
19 talking millions. It took me a long time to figure
20 billions. And then I had to do my grade school math
21 and figure where all the zeroes were going. But go
22 ahead, what about the damages?

23 MS. CONRAD: We agree to the instruction that
24 the plaintiff is entitled to be fairly and
25 adequately compensated. We object to the remainder

1 of the instruction because it misstates the law and
2 draws an improper conclusion of fact as well as it
3 improperly addresses liability, which is addressed
4 in the previous instruction. So with respect to
5 paragraph 10, second and third paragraph.

6 THE COURT: Okay. So we're at -- so I'm on
7 page 46, Defendant's instruction number 40, and you
8 like the first paragraph but the second paragraph
9 beginning A, you object to?

10 MS. CONRAD: Sir, I'm critiquing what
11 Plaintiff submitted.

12 THE COURT: I'm looking at -- okay. I'm
13 going to flip over and get on the right page here.

14 THE COURT: Which one are we on?

15 MS. CONRAD: Instruction number 10,
16 defamation damages.

17 THE COURT: Okay. Defamation damages, okay.
18 Page 13, number 10?

19 MS. CONRAD: Correct. The second and third
20 paragraph, sir.

21 MR. STROKOFF: And Your Honor, this is not
22 the standard charge.

23 THE COURT: Pardon me?

24 MR. STROKOFF: This is not the standard
25 charge.

1 THE COURT: So let me ask you this, Ms.
2 Conrad. Do you object to the standard defamation
3 charge?

4 MS. CONRAD: We included the standard charge
5 as proposed on damages.

6 THE COURT: Okay.

7 MR. STROKOFF: I think they've got some stuff
8 about public officials in there, Your Honor.

9 THE COURT: Well, and counsel's nodding her
10 head again, so I take it we're going to go with the
11 straight defamation damages nonpublic official right
12 out of the book.

13 MS. CONRAD: That's right. We would delete
14 that last paragraph based on your ruling.

15 THE COURT: Okay. So we're just going to
16 give the standard. What else?

17 MS. CONRAD: Moving onto punitive damages.
18 And we would request the jury be charged with the
19 proposed damages as we have cited listed at numbers
20 49 through 55.

21 THE COURT: Okay. So what's your position?

22 MR. STROKOFF: The modifications, and in
23 particularly, defining outrageous conduct to exclude
24 conduct which is in reckless indifference to the
25 rights of others. So I mean it says here this is a

1 modified -- or it says it's adapted from suggested
2 jury instruction. I mean, I'll go with the jury
3 instruction, the standard instructions but not
4 modified like this when they're leaving something
5 out.

6 MS. CONRAD: Your Honor, I would raise in the
7 first instance as to whether or not an instruction
8 on punitive damages is warranted in this case. I
9 would suggest that the evidence does not establish
10 that such an instruction is warranted.

11 THE COURT: Okay. Do you want to be heard?

12 MR. STROKOFF: Totally nonplus on both of
13 them. To lie to somebody that comes in to report a
14 crime like this and to not do anything about it and
15 subject my client on the basis of the
16 misrepresentation to be accused of being part of
17 this cover up, I certainly think is outrageous
18 warranting punitive damages. And the same thing
19 with respect to the communication. Tell me -- when
20 you don't read -- you know, nobody read the
21 presentment, nobody knew what the charges were, and
22 you're saying that they're groundless?

23 MS. CONRAD: Saying the record will show, an
24 expression of opinion. Moreover it wasn't that he
25 wasn't -- there's no evidence on the record that he

1 wasn't told anything. Plaintiff testified to two
2 meetings. Plaintiff testified in the first meeting,
3 he was told that the matter was taken seriously and
4 would be reviewed. He then testified ten days later
5 he received a call from Mr. Curley and Mr. Curley
6 informed him of the three actions that he took, that
7 the University took.

8 THE COURT: That's true. Under the law as it
9 existed, appropriate action by Curley and Schultz
10 required them. And I will tell the jury, if they
11 credit Mr. McQueary's version of what he told them,
12 that he observed conduct of a sexual nature, that
13 they were required by the then existing law to go
14 ahead and report that to the police and to the
15 appropriate Department of Public Welfare or Children
16 and Youth Services Agency, whatever it was.

17 MS. CONRAD: Your Honor, the evidence on the
18 record is to the contrary. Again, Plaintiff put a
19 witness on that testified that while he suggested it
20 was the smart thing to do to report, it was not
21 required. That's the evidence on the record.

22 MR. STROKOFF: What we're talking about I
23 think is punitive damages. And the thing, Your
24 Honor, and the representation was --

25 THE COURT: The misrepresentation is that

1 because Mr. McQueary thought they were going to take
2 the appropriate action, and the appropriate action
3 under the law was to report it, because they failed
4 to do that, Mr. Sandusky continued to do what Mr.
5 Sandusky was doing until the attorney general got
6 involved and the case blew up. And Mr. McQueary is
7 now being pointed at as the person who's failure to
8 act would have prevented Mr. Sandusky from
9 continuing to do what he was doing. And you, in
10 fact, raised that because you said did he go back?
11 Did he separate the boy? Did he do anything? And
12 that was action that Mr. McQueary, both under Penn
13 State's policy, which was unrefuted because the
14 medical doctor Dranov, or whatever his name he said,
15 that his understanding of procedure was you go to
16 your superior, he went to his superior, Paterno went
17 to his superior, neither one of them were mandated
18 reporters, McQueary nor Paterno, but Schultz and
19 Curley were. And the appropriate action is that
20 they would have reported it. So the argument is
21 that the failure to report is what was the
22 misrepresentation because they said they would take
23 appropriate action and they didn't. And that's
24 where we're at.

25 MS. CONRAD: First, there is no record on the

1 evidence, except what Plaintiff has testified to,
2 that there was a report of child sexual abuse. Dr.
3 Dranov himself said there was no information
4 received about sexual misconduct. As a result to
5 take it to the next step and thereby create a
6 mandated report when advice that counsel introduced
7 in his case was that you're not required to report
8 it.

9 THE COURT: Yeah. Because -- you're putting
10 the rabbit in the hat because the attorney said I
11 was told it was horseplay.

12 MS. CONRAD: Yes.

13 THE COURT: Okay. So if it's horseplay then
14 of course it's an entirely different situation. So
15 if the jury credits that what McQueary told Curley
16 and Schultz was that he observed what he believed to
17 be sexual conduct and they said we're going to take
18 the appropriate action, that meant what I just
19 indicated. On the other hand, when Schultz and/or
20 Curley, I can't keep everybody straight at this
21 point in time goes and talks to the attorney and
22 says I'd like you check into this because I'm told
23 that a graduate assistant is upset because he saw
24 horseplay in the shower. Horseplay in the shower is
25 something entirely different from bear hugging a

1 child when you're naked and the child is naked in
2 the shower and making sounds that are of a sexual
3 nature. So if, in fact, the jury determines that
4 Mr. McQueary is credible on that, then clearly Mr.
5 Curley and/or Mr. Schultz are not credible in what
6 they passed on. And the advice of Mr. Courtney, or
7 the attorney, would not have been gee, I think it
8 would be a good idea that you do it, you don't have
9 to. I would imagine he would be saying, if he heard
10 what McQueary says he told them, you go to report
11 it.

12 MS. CONRAD: And there it gets back to the
13 fundamental issue with this case, without Curley and
14 Schultz to testify as to what they were told, we
15 don't know all of the facts.

16 THE COURT: Well, sure we do because, again,
17 you're putting the rabbit in the hat. We know what
18 Curley went and told Spanier -- or told -- yes, told
19 Dr. Spanier because Spanier sat here and testified
20 and this is what they told me, it's horseplay.
21 Okay? So you've got their testimony. So they
22 either told him that it was horseplay and you got
23 that in front of the jury and I'm going to tell the
24 jury if it's horseplay it's a different kennel of
25 fish. Or they didn't tell him the truth. The truth

1 being what Mr. McQueary told them.

2 MS. CONRAD: On the record in --

3 MR. STROKOFF: Or Dr. Spanier wasn't telling
4 the truth.

5 THE COURT: Or Dr. Spanier wasn't telling the
6 truth.

7 MS. CONRAD: On the record in this case,
8 though, there is no evidence to establish that
9 Curley and Schultz had reasonable cause or suspicion
10 to conclude that there was child abuse.

11 THE COURT: No.

12 MS. CONRAD: There's no evidence on the
13 record.

14 MR. STROKOFF: There's --

15 THE COURT: Excuse me. You can take that
16 position, counsel, with all due respect. But if
17 what McQueary told them the jury determines that to
18 be true, in light of what they knew from the earlier
19 incident, no. So the punitives are in.

20 MS. CONRAD: We, in addition, object to the
21 reference to the word generally as contained on
22 paragraph -- on page 14 number 11, punitive damages.

23 THE COURT: So the first word in the second
24 paragraph, generally, you're objecting to?

25 MS. CONRAD: Yes, sir.

1 THE COURT: Fine. You don't care if the word
2 generally is said, just begin with punitive damages?

3 MR. STROKOFF: I don't think so, Your Honor.

4 MS. CONRAD: There is a reference then, still
5 trying to find it in this section, there's no legal
6 support for the proposition that the jury may
7 include the plaintiff's trouble and expense in
8 seeking to protect his interest in legal proceedings
9 and in this suit.

10 MR. STROKOFF: I know. That came out of the
11 standard instruction.

12 THE COURT: I don't know where you're at so
13 you're going to have to tell me.

14 MS. CONRAD: I'm locating it, sir.

15 MR. STROKOFF: Bottom of page 16, Your Honor.

16 THE COURT: Page 16.

17 MS. CONRAD: Number two.

18 THE COURT: Okay. And you're telling me that
19 it's right out of the standard charge?

20 MR. STROKOFF: That's my recollection, Your
21 Honor. I do want the Court to understand that my
22 memory is not as good as it might be but that's my
23 belief.

24 MS. CONRAD: But our understanding is this
25 instruction is improper because it suggests that

1 Plaintiff can recover attorney's fees for his
2 defamation claim.

3 MR. STROKOFF: It's the standard instruction,
4 I believe.

5 THE COURT: Okay. We'll give the standard
6 instruction.

7 MS. CONRAD: And finally, on number three,
8 sir. While we acknowledge that the University's
9 wealth is relevant to punitive damages, there ought
10 to be an instruction that the jury may not consider
11 net worth when determining compensatory damages.

12 THE COURT: Okay. So, do we have a general
13 damage claim in here, section? We'll cover that.
14 We'll take care of that.

15 MS. CONRAD: Moving onto misrepresentation.

16 THE COURT: Just a second. Okay.
17 Misrepresentation, go ahead.

18 MS. CONRAD: The plaintiff's instruction
19 misstates the evidentiary burden for proving a claim
20 of intentional misrepresentation. To succeed in
21 such a claim, the plaintiff has the burden of
22 proving each element with clear and convincing
23 evidence.

24 THE COURT: I believe you're correct. And we
25 have that language in there.

1 MS. CONRAD: Plaintiff's instruction also
2 fails to define the necessary elements to establish
3 intentional misrepresentation.

4 THE COURT: We'll give it right out of the
5 book.

6 MS. CONRAD: And then finally, the
7 plaintiff's instructions confound the liability
8 instruction for intentional misrepresentation and
9 punitive damages. The instruction should be
10 separate.

11 MR. STROKOFF: I do follow that immediately.
12 But I don't have a problem with it separate. That's
13 on page 19.

14 MS. CONRAD: We would propose jury
15 instruction 29 and 41, which properly layout the
16 evidentiary standard and also defines the element of
17 each case -- on each cause of action.

18 THE COURT: Okay. Again, we'll take a look
19 at the standard and we'll play it in. I'm going to
20 try and have everything by tomorrow morning when you
21 come in so you can see exactly what we're doing.
22 Try.

23 MS. CONRAD: And also, Your Honor, we would
24 request that the following instruction be added to
25 properly reflect the Pennsylvania law, Plaintiff

1 cannot sustain his claim for intentional
2 misrepresentation if you find that the alleged
3 misrepresentations by Tim Curley and Gary Schultz
4 were concerning promises to do something in the
5 future.

6 MR. STROKOFF: I don't think that's accurate,
7 Your Honor.

8 MS. CONRAD: Shoemaker versus Commonwealth
9 Bank, 700 A Second --

10 MR. STROKOFF: If somebody says they're going
11 to do something in the future and they know that
12 representation is false at the time they make it,
13 that's misrepresentation.

14 MS. CONRAD: The exact quote is, "A promise
15 to do something in the future is not a proper basis
16 for a cause of action for fraud."

17 MR. STROKOFF: Yeah. But that's unless they
18 know it's not true at the time they make the
19 uttering.

20 MS. CONRAD: That's not what the case law
21 says.

22 THE COURT: So if I say to you, I've heard
23 what you've said to me and it's really bad and next
24 week I'm going to go and talk to the boss about it,
25 your position would be that's not a

1 misrepresentation because it's future conduct, he's
2 going to go and take care of it next week?

3 MS. CONRAD: It hasn't occurred, so you can't
4 base an intentional misrepresentation on something
5 that has not occurred, something that relates to the
6 future.

7 THE COURT: So then you could never have a
8 misrepresentation when A tells B information that B
9 needs to act upon. B either has to be able to act
10 upon it immediately or if he can't react on it
11 immediately and then has to do it the next day or
12 whenever the future day is, that there's no
13 justifiable reliance, there's no misrepresentation?
14 Can't B -- I'm sure when we read the case, there's
15 got to be some subtle nuance that we'll be able to
16 fair it out. Okay. All right. I saw something
17 here about adverse inference.

18 MR. STROKOFF: Your Honor, I do want you to
19 know that in our proposed charge on
20 misrepresentation, we cited a Supreme Court case,
21 specifically quoting a statement of present
22 intention. Present intention, which is false when
23 uttered a constitute or fraudulent misrepresentation
24 fact. So that's -- I don't know what that other
25 case is, but that's what the Supreme Court said.

1 Adverse inference is on page nine, the charge
2 Plaintiff seeks, Your Honor.

3 MR. STROKOFF: And that case, the case site,
4 it says Pennsylvania Commonwealth, it should say
5 Pennsylvania Supreme Court. I apologize. It should
6 just say PA 2015, that's a Supreme Court decision.

7 THE COURT: And your position is the charge
8 is not appropriate because of the fact that they're
9 not A, within your control and/or B, they're
10 exercising their Fifth Amendment right?

11 MS. CONRAD: And C, that they are not named
12 defendants in this action. So we actually start
13 with, that they are not named defendants, nor were
14 they and they are not employees of the University.
15 As a result, we do not control them.

16 THE COURT: But they're the agents whose
17 actions, again, depending on how the evidence is
18 found makes the defendant, University, the defendant
19 in the case. And of course, the University can only
20 act through its agents.

21 MS. CONRAD: But we have no control over them
22 at the time of this litigation in order to tell them
23 it is their job duty to come in and testify here.

24 THE COURT: But that brings us back to the
25 argument we've been battling all along because

1 clearly, if Mr. McQueary only told them that it was
2 horseplay in the showers, they have no real Fifth
3 Amendment self-incrimination right to assert because
4 that information required no action on their part.
5 On the other hand, if Mr. McQueary told them I saw
6 two naked people in the shower and I heard sexual
7 sounds and they told the grand jury that no, no, it
8 was horseplay, they got a problem. And the problem
9 is that absent -- conundrum they put themselves in,
10 their testimony would be expected, that they would
11 would come in and say no, he never told us that, my
12 God, if he told us that, we would have done X, Y,
13 and Z.

14 MS. CONRAD: Their case has not yet been
15 tried, sir, so it is their Constitutional right to
16 assert their Fifth Amendment rights. We have no
17 control over them to bring them into this
18 proceeding.

19 THE COURT: And we've made the record, we're
20 four years post Sandusky, we're just beginning his
21 PCRA. And having done criminal law for 40 plus
22 years, it will be another four years before we get
23 to round two of the PCRA. And unless there's an
24 acquittal or Mr. Curley and/or Mr. Schultz, they
25 won't be available for years to come. So the

1 reality of the situation is, it is what it is.
2 You've got your issue preserved. And you know, we
3 already have visited this issue. So I understand.

4 MS. CONRAD: My point though, sir, is in this
5 case, the adverse inference should not apply.

6 THE COURT: Well, I'm going to give it, with
7 the understanding that if I'm wrong, we'll all be
8 back here in good old Bellefonte in a year or two
9 and see what happens.

10 MS. CONRAD: And sir, I just want to clarify
11 that the instruction is that you may but need not
12 conclude.

13 THE COURT: Of course. Of course.

14 MS. CONRAD: And we have a brief on the
15 issue, if we may hand up for purposes of preserving
16 the record.

17 THE COURT: Sure.

18 MS. CONRAD: Thank you. I neglected to sign
19 them but I'll do so when I file them.

20 THE COURT: Okay. Do we need to cover
21 anything else?

22 MS. CONRAD: I believe there's one more
23 thing.

24 MR. STROKOFF: Plaintiff won't be filing a
25 responsive brief.

1 THE COURT: Pardon me?

2 MR. STROKOFF: Plaintiff won't be filing a
3 responsive brief to this trial memo.

4 THE COURT: Okay.

5 MS. CONRAD: As cited in the RAD Services,
6 Inc. case on page four.

7 THE COURT: Of the memo you just handed me?

8 MS. CONRAD: Yes, sir. Even where permissive
9 adverse inference may be warranted, it gets further
10 instructions to the jury that is that the
11 University's entitled to rebut any negative
12 inference presented by the silence of Curley and
13 Schultz. The jury should be instructed that if a
14 plaintiff has not supplied evidence sufficient to
15 meet his burden of proof, the adverse inference
16 created by the party's failure -- or the witnesses
17 in this case failure to testify will not supply it
18 for him.

19 THE COURT: So in that case, how was the
20 negative inference rebutted? What evidence did you
21 put forward to rebut it?

22 MS. CONRAD: There's no evidence to support
23 the adverse inference.

24 MR. STROKOFF: Your Honor, may I --

25 THE COURT: If they find McQueary says what

1 he said and if they find that -- we already know
2 what Curley and Schultz's position is because you
3 put it in through Dr. Spanier, the information that
4 was passed along to Dr. Spanier in that chain of
5 emails that shows everything. So you got your view
6 in. And if that's the evidence you're going to rely
7 on, that's what I'm going to tell. You know,
8 believe McQueary, go one way. You believe the
9 emails, the string of emails and Dr. Spanier's
10 testimony that it was horseplay, we're going another
11 way. I'm sure when we read that case, it's not
12 going to say what you think it says.

13 THE COURT: So now your sidekick is shaking
14 her head, so I never know if she's with you, against
15 you.

16 MS. CONRAD: I'll let her speak for herself
17 if you want.

18 MR. STROKOFF: Your Honor, I do believe what
19 what I think they're confusing is there is precedent
20 which says that the adverse inference by itself is
21 not enough to sustain a burden of proof. I think it
22 was an unemployment compensation case. That's not
23 what we're talking about here. There's a lot of
24 evidence. And the adverse inference is on top of
25 that evidence.

1 THE COURT: Right. Is that in sync with you,
2 counsel, or not?

3 MS. HAVEAR: I would disagree. I would say
4 that there should be an instruction that the jury
5 not only is it a may, a permissive instruction, but
6 that we have the opportunity to rebut and that the
7 plaintiff can sustain his case based on the adverse
8 inference.

9 THE COURT: Based solely on the adverse
10 inference?

11 MS. HAVEAR: Correct.

12 THE COURT: But that's not the evidence here.
13 It's not based solely on the adverse inference. I
14 mean, you have Mr. McQueary's direct testimony that
15 this is what happened. You have the evidence as
16 part of the record that there was an earlier
17 incident.

18 MS. HAVEAR: But the misrepresentation claim
19 is based off of --

20 THE COURT: Pardon me?

21 MS. HAVEAR: The misrepresentation claim
22 could be solely decided by an adverse inference
23 improperly by the jury without that instruction.

24 MR. STROKOFF: If we didn't have Mr.
25 McQueary's testimony and we just had an adverse

1 inference. But you can't say that just because it's
2 the plaintiff's testimony that that doesn't carry --
3 that that's not evidence.

4 THE COURT: Okay. We'll take a look at these
5 two cases. And of course you didn't bring copies
6 with you for the rest to look at. Okay. What else?

7 MS. CONRAD: I think we're concluded, sir.

8 THE COURT: Se you at 8:15.

9 MR. STROKOFF: Your Honor, you're going to
10 give the jury some kind of guidance with respect to
11 the whistleblower, to tell them that they're not in
12 that, right?

13 THE COURT: I'm going to tell them that
14 they're not deciding the whistleblower case.

15 MR. STROKOFF: In terms of -- okay.

16 THE COURT: I'm going to tell them that --

17 MR. STROKOFF: So, we shy away from that?

18 THE COURT: No. I'm going to tell them that
19 as a matter of law, I have to decide the
20 whistleblower case, they decide defamation and
21 misrepresentation. But to properly present those
22 two claims to them, they had to have the context of
23 everything that was going on and they needed to hear
24 everything that would be, technically, within the
25 realm of the whistleblower lawsuit as context to

1 view the defamation count, to view the
2 misrepresentation count. But they need not worry
3 themselves about resolving the whistleblower, that's
4 for the Court to decide.

5 MS. CONRAD: And that instruction will be
6 after closing, sir?

7 THE COURT: Yeah. Unless you want me to tell
8 them --

9 MR. STROKOFF: I think on the whistleblower,
10 Your Honor, I think it would make more sense, just
11 on the whistleblower, to explain that before we
12 close.

13 MS. CONRAD: Oh, I disagree. Before the
14 closing?

15 THE COURT: Well, they're going to be -- you
16 know, one thing I always do is I write down the
17 educational background of everybody that's on the
18 jury and the majority of them are associate degree
19 through advanced degree. There's only three or four
20 who are only high school people. So they're
21 probably going to remember hearing that, you know,
22 there's a whistleblower and there's defamation and
23 there's misrepresentation and why are these folks
24 only talking about two things? What happened to the
25 whistleblower claim? So I think it probably does

1 make a lot of sense to say hey, you know, you're not
2 going to hear any argument about the whistleblower
3 claim because we've kept you in the dark for a
4 specific reason, you don't get to decide that claim,
5 the Court gets to decide it. But for context
6 purposes you need to hear the whole story, which you
7 did, and for that reason, counsel will be limiting
8 their arguments to the defamation and the
9 misrepresentation claims. And they may make some
10 reference to the factual context to put all that
11 together. I think that does make sense. Because
12 otherwise, somebody's going to be sitting there
13 saying, what are we missing and why?

14 MS. CONRAD: Your Honor, then how do we make
15 our closing to you?

16 THE COURT: You're going to get to make your
17 closing to me after we've closed to the jury and we
18 sent them out and they could go and deliberate. I
19 would assume that you would want some time to deal
20 with one fact finder and then deal with the other
21 fact finder later. So I was not expecting that you
22 were going to address it until we got the jury out
23 of the way and deliberating, and then I was going to
24 give you the additional courtesy if you wanted to
25 wait to do your findings or whatever and then have

1 the argument at that point in time, I'm fine. Or
2 you want to argue all afternoon? That's okay by me.

3 MS. CONRAD: I just was asking for the
4 opportunity, sir. Happy to wait on it.

5 THE COURT: So how do you want to handle the
6 whistleblower?

7 MR. STROKOFF: Can I let you know tomorrow
8 morning, Your Honor? The idea of having to submit
9 something in writing in a week is not --

10 THE COURT: There's no requirement.

11 MR. STROKOFF: I understand. And we did
12 submit the three or four page memo two weeks ago.

13 THE COURT: Right. All I'm saying is I'm
14 willing to accommodate you and do it any way you
15 want. If you want to make findings and submit them,
16 go ahead. If you want argument, you can have it.
17 You can have it whenever.

18 MS. CONRAD: Your Honor, I would just like to
19 know before we leave tonight whether we're including
20 the whistleblower claim in any portion of our
21 closing tomorrow?

22 MR. STROKOFF: Well, not to jury.

23 THE COURT: Yeah, not to the jury. And to
24 the extent you want to argue whistleblower after
25 you've dealt with the jury, that's fine.

1 MS. CONRAD: Alternatively, if we request the
2 opportunity to submit on papers, you would find that
3 acceptable?

4 THE COURT: Yes. That's fine. So both of
5 your clients need to be in agreement that I don't
6 have to have everything done in seven days. Because
7 I mean, I'm into about day four of last week reading
8 and making notes, et cetera, but I got a lot more to
9 read. So I'll need to know that tomorrow.

10 MR. STROKOFF: 8:15?

11 THE COURT: 8:15. A lot will happen at 8:15.

12 MS. CONRAD: Your Honor, any special
13 interrogatories or verdict slip going out with the
14 jury?

15 THE COURT: If you want to submit a proposed
16 verdict slip, go ahead. You know, it's pretty
17 straightforward.

18 MS. CONRAD: Okay. Can we submit that
19 tomorrow morning at 8:15, sir?

20 THE COURT: You can submit that at 8:15 as
21 long as you have a copy. But I mean, you know, did
22 the Spanier statement defame Mr. McQueary? Yes or
23 no. And depending on that, you get to answer a
24 damage question and then same thing with the
25 misrepresentation. I mean, I don't see it as rocket

1 science and I'm not going to be going down each
2 individual element, do you find this element, do you
3 find that element, you know, I don't think we need
4 to do that.

5 MR. STROKOFF: Is it your practice, Your
6 Honor, to give the jury your instructions in
7 writing?

8 THE COURT: No.

9 MR. STROKOFF: And the order of closing, you
10 were going look into that?

11 THE COURT: The order of closing is she goes
12 first and you go last.

13 MR. STROKOFF: Okay.

14 THE COURT: Okay? I have no objection to
15 giving the jury, if they request it and if I can't
16 explain it adequately, the written statement of the
17 elements of defamation and misrepresentation. But I
18 think that adds more confusion than anything else.
19 We'll explain it to them. If they have a question
20 when they come out and I'm still not getting through
21 to them, then I'll think about giving them something
22 in written form.

23 MR. STROKOFF: And I understand that your
24 practice is to let them go until seven and if they
25 don't --

1 THE COURT: Well, I'm going to ask them
2 tomorrow, you know, how late do they want to stay.
3 I'm told here in this county you can go to ten
4 o'clock at night.

5 MR. STROKOFF: But they can go home? They're
6 not going to --

7 THE COURT: No, they'll go right home.
8 They're not being sequestered.

9 THE COURT: So no. But I will ask them if
10 they could stay as late as they can, as they want.
11 You know, there comes a point in time where they're
12 just burned out and they need a rest. So we'll see.
13 Okay. 8:15.

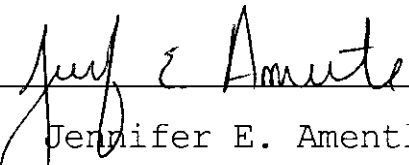
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C E R T I F I C A T E

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.

11/21/16

Date

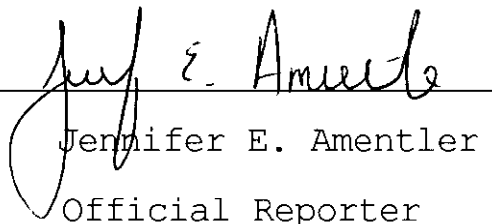

Jennifer E. Amentler
Official Reporter

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 November 2, 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

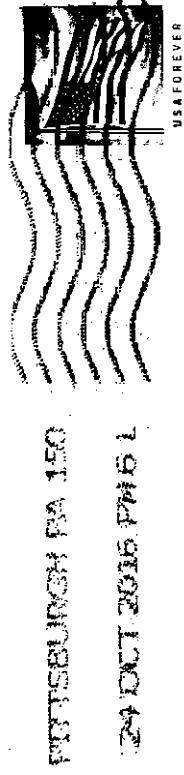
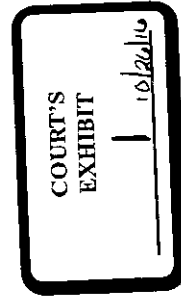

Jennifer E. Amentler
Official Reporter

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.

11-1-16 Thomas G. Gavin
Date Thomas G. Gavin
Senior Judge
Specially Presiding
15th Judicial District

Mary M. Shirey
204 Schars Lane
Pittsburgh, PA 15237-2215



The Honorable Thomas G. Gavin
Centre County Court House
102 South Allegheny Street
Pittsburgh, PA 15223
15823-198699

204 Schars Lane
Pittsburgh, PA 15237-2215
October, 22, 2016

Honorable Thomas G. Gavin
Centre County Court House
102 South Allegheny Street
Bellefonte, PA 16823

Dear Judge Gavin:

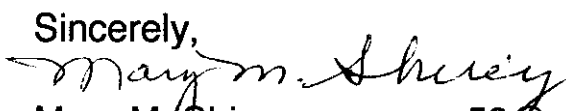
As a Penn State grad and concerned citizen, I am writing on behalf of Mike McQueary. When Penn State did not renew his contract, I was incredulous. He should have been complimented for reporting to three superiors what he had witnessed in the team shower, rather than ignored and, ultimately, criticized.

Sandusky's actions were outrageous and appalling (even molesting an adopted son), and, in hindsight, one should give McCreary credit for making it possible to discover the truth.

When a so-called whistle-blower reveals very important information, should that person have to defend his actions? I strongly recommend awarding McQueary lost wages. Attorney Nancy Conrad's stance that he is exploiting the tragedy for his own personal gain is totally without substance.

To second guess someone who reports the witnessing of sexual abuse is impossible to understand - especially when a notorious pedophile is finally - finally revealed. The latest development certainly doesn't make me proud of Penn State - when, once again, the actions are unjustified.

Sincerely,



Mary M. Shirey - mmspsc53@verizon.net (412) 364-5717

Copies: Elliot Strokoff, Esq. and Nancy Conrad, Esq.

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

Docket No. 2012-1804

(Judge Gavin)

Stipulation

It is hereby stipulated and agreed that if Gary C. Schultz and/or Timothy M. Curley were called to testify at the trial of this matter and asked questions about any of the allegations made by the Plaintiff, or Plaintiff's testimony, or asked to identify certain documents appended to the depositions which they provided in this case, or any of the defenses asserted by Defendant, including information they received from Plaintiff and their responses thereto, that each would refuse to answer all such questions on the basis of their Fifth Amendment right against self-incrimination. Therefore, they will not be testifying in this case.



Respectfully submitted,

STROKOFF & COWDEN, P.C.

By: 

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WHITE AND WILLIAMS, LLP 

By: _____

Nancy Conrad, Esq.
3701 Corporate Parkway, Suite 300
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DATE: 10/25/16